MUNICIPAL BOARD DECISIONS

VOLUME NINE–B/1990

Nova Scotia

Municipal Board

MEMBERSHIP OF NOVA SCOTIA MUNICIPAL BOARD

CHAIRMAN:	MICHAEL G. JOHNSON, C.A.
VICE-CHAIRMAN:	LINDA D. GARBER, LL.B.
MEMBER:	RICHARD L. WELDON, LL.B.

DOREEN A. FRIIS - Clerk

CLYDE A. PAUL, LL.B. - Counsel

THIS VOLUME CONTAINS ALL PLANNING, MUNICIPAL BOUNDARIES AND OTHER DECISIONS (EXCEPT ASSESSMENT) FROM JANUARY 1, 1990 TO DECEMBER 31, 1990.

THESE DECISIONS ARE PUBLISHED PURSUANT TO SECTION 44(1) OF THE MUNICIPAL BOARD ACT, CHAPTER 9, STATUTES OF NOVA SCOTIA, 1981.

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MARRIOTT & BAKER v. HALIFAX COUNTY

PLANNING - SUBDIVISION - REFUSAL TO APPROVE - BOARD'S POWERS - PLANNING ACT S. 103.

The Appellants appealed a refusal to approve a tentative application for subdivision. At the hearing the Board advised the parties of its previous decision Walsh v. Town of Bedford (1989), 8 M.B.D. The Appellants abandoned the appeal.

HELD: Appeal dismissed.

If the appeal proceeded, the Board could not allow the appeal even if the Board were convinced that the appellants' position was correct.

NSMB-32-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S., 1983 c. 9, as amended, by **GARY JAMES MARRIOTT** and **COLIN BAKER** from a decision of the Development Officer, **SHARON BOND**, made September 1, 1989, which refused to subdivide Lot No. 1 of the Colin Baker Subdivision, Herring Cove Road, Halifax County, Nova Scotia.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: COLIN BAKER, on his own behalf and on behalf of GARY MARRIOTT;

ROBERT G. CRAGG, LL.B., on behalf of the Municipality of the County of Halifax.

HEARING DATE: November 29, 1989.

DECISION DATE: January 8, 1990.

DECISION: Appeal Dismissed.

DECISION

On April 19, 1988, a preliminary application for subdivision of Lots 1 to 6 of Colin Baker's lands on the Herring Cove Road was filed with the Municipality of the County of Halifax. On May 17, 1988, Sharon Bond, Development Officer, wrote Mr. Baker refusing the application, stating that:

"Internal road layout will have to be changed."

No further action was taken on this application.

On June 14, 1989, Gary Marriott made a tentative application for subdivision of Lot 1 on these same lands of Colin Baker. On September 1, 1989, Sharon Bond wrote Gary Marriott informing him that the application for tentative subdivision approval was rejected and stated the reasons which centered on road access to the proposed subdivision.

The Board received an appeal from this decision on September 13, 1989.

Prior to the presentation of evidence for this hearing, the Board noted that this appeal was the result of a refusal of tentative approval of subdivision.

The Board's ability to deal with a refusal of development officer for preliminary or tentative approval of subdivision was dealt with in some length in a recent decision, Walsh v. Zwicker and the Town of Bedford (1989) NSMB-11-89-P (unreported).

The Walsh case was an appeal from a refusal of the Development Officer for the Town of Bedford to approve a tentative plan of subdivision (not a preliminary plan). However the Board's discussion in that decision was applicable to both preliminary and tentative applications and thus is relevant to this appeal.

The issues discussed in the Walsh decision were whether or not a refusal of a tentative or preliminary application for subdivision was appealable to the Board and what the Board's powers were if such a refusal was appealable.

At page 8 of the Walsh decision the Board concluded that:

> "...all refusals of a development officer under 96(3)(c) are appealable to the Board by virtue of 103(1)."

These references are to sections of the Planning Act.

Section 103(1) states:

> "Where a development officer refuses to approve a plan or an instrument of subdivision, the applicant therefore may appeal the decision to the Board."

The Board continued on page 8 of the Walsh decision with the following comment:

> "The Board is also of the opinion that its powers are restricted by 103(4) and (5) in granting an appeal if it is for anything other than an approval of a final plan or instrument of subdivision."

These Sections of the Planning Act state as follows:

> "(4) The Board shall
>
> a) confirm the decision of the development officer; or
>
> b) allow the appeal by directing the development officer to approve the plan or instrument of subdivision.
>
> (5) Where and only where the plan or instrument of subdivision is in accordance with the subdivision regulations or the subdivision by-law, whichever is applicable, the Board shall allow the appeal."

In the Walsh appeal, the Board went on to discuss the merits of the appeal and eventually decided in favour of the development officer.

In determining to review the matter the Board made the following comment on page 9:

> "The Board, in deciding to review the merits of the Development Officer's decision, is limited in its powers of decision. Even if it should agree with the Appellant's position it still could not allow the appeal for the reasons already discussed. However, the Board's agreement with the Appellant's position could certainly provide a firm basis on which to make application for a final plan of subdivision."

The Board felt that it was important that all parties involved in the current appeal under review should be aware of the implications of the Walsh decision. In particular, the Board wanted to be sure that the Appellants were fully aware that if the appeal proceeded, the Board could not allow the Appeal even if the Board were to be convinced that the Appellants' position was correct.

Copies of the Walsh decision were made available prior to all the parties agreeing to a recess in order to consider its implications on the current appeal.

When the hearing recommenced, Mr. Kenneth W. Robb was permitted to speak on behalf of the Appellants. Mr. Robb is a land surveyor in the Province of Nova Scotia and had been scheduled to appear as a witness on behalf of the Appellants.

Mr. Robb indicated that his clients believed that their position was strong and that they wished to present their case to the Board in the belief that the Board would allow their appeal. The Board again questioned whether or not the Appellants fully understood the implication of the Walsh decision. The Board reiterated that it was, in fact, powerless to grant the Appellants the relief they sought even should the Board agree with their evidence. The Board again expressed a willingness to proceed with hearing the evidence if the Appellants wished to do so but only with the full understanding that no Order could be made allowing their appeal no matter what the outcome.

A further recess was requested by Mr. Robb at this time.

At the recommencement of the hearing for a second time, Mr. Robb indicated that the Appellants wished to abandon the appeal at this time. Both Appellants agreed verbally to the Board that this was their desire.

The Board expressed its regret to the parties involved in this appeal for not having brought the problem to everybody's attention at a sooner date. The Board has subsequently initiated an internal process so that in the future an appellant will be made aware of the Walsh decision and how it might affect an appeal from the refusal of a development officer to approve a tentative or preliminary application for subdivision approval.

As no evidence was offered by the Appellants and the Appellants had indicated their desire to abandon the appeal, the Board hereby dismisses the Appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 8th day of January, A.D., 1990.

MICHAEL G. JOHNSON
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

MacDONALD v. HALIFAX COUNTY

PLANNING - REZONING - REFUSAL - R-2 TO C-1 - BEST INTERESTS OF THE MUNICIPALITY - PLANNING ACT, S. 63(6), 112.

The Appellant sought a rezoning from R-2 to C-1 to legalize his use of the land since 1974 as a commercial site for his excavation, fill and trucking business. The pit operation has ceased. The existing Zoning By-law zones the surrounding area R-2 but Board found many residents have commenced commercial uses of their land. The Appellant proposes to build a large garage on the property, his own home is located there as well. In order to comply with the by-law, it is necessary to rezone larger portions to give road frontage.

HELD: Appeal allowed. Board rezoned a portion of the land to C-1.

Even if the decision of Council is not inconsistent with the best interests of the Municipality, that does not end the matter. The size of the rezoning, buffering, the failure to fully inform Council on all planning matters indicates that Council's decision is unnecessary for the protection of the best interests of the Municipality.

NOTE: Leave to appeal to the Nova Scotia Supreme Court, Appeal Division, granted. The appeal was dismissed.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S. 1983, c. 9, as amended, by ALVIN MacDONALD from a decision of the Council of the MUNICIPALITY OF THE COUNTY OF HALIFAX made August 21, 1989, refusing to rezone lands of A.L. MacDONALD and J.E. MacDONALD at Brookside Road, Halifax County from R-2 (Two Unit Dwelling) to C-1 (Local Business) Zone.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: TIM HILL, LL.B., on behalf of the Appellant, ALVIN MacDONALD;

ROBERT G. CRAGG, LL.B., on behalf of the Municipality of the County of Halifax.

HEARING DATES:	January 9, 1990, January 10, 1990.
DATE OF INSPECTION OF SITE:	January 9, 1990.
DECISION DATE:	January 31, 1990.
DECISION:	Appeal Allowed.

DECISION

This is an appeal under the Planning Act, S.N.S. 1983, c. 9. It is an appeal from an August 21, 1989, rezoning refusal decision. The Council of the Municipality of the County of

Halifax, refused to rezone land of the appellant, Alvin MacDonald. Alvin MacDonald's land lies to the west side of Brookside Road in the County of Halifax. The Appellant applied to rezone the land from R-2 (Two Unit Dwelling) Zone to C-1 (Local Business) Zone. The Appellant appealed Council's refusal decision to the Board.

The Appellant wanted his land located to the west side of Brookside Road, rezoned from R-2 to C-1. The Appellant proposed thereby to legalize his use of the lands as a commercial site for his excavation, fill and trucking business. Inter alia he was extracting fill from the larger portion of his acreage. He used his own mechanical equipment to excavate and to haul the fill extracted.

The Appellant's land originally consisted of three lots shown graphically in the Appeal Record, being Exhibit M-2, page 51. His house lot is on parcel 104 which abuts the Brookside Road. The rear lot, parcel 104A, amalgamated by subdivision with his parcel 104, lies to the rear (west) of parcel 104. It lies to the north of parcel HL-B. Parcel HL-B is a large lot on which one finds the Appellant's existing pit and proposed pit. All three parcels are now made one lot by subdivision, Lot 104B.

To clarify the location of the property and its grades, the Board has photostated page 51 of Exhibit M-2. The Board has attached this photostat as Schedule "A", to this decision.

According to the Notice of Appeal, the Appellant was applying to rezone Lot 104B from R-2 to C-1. Lot 104B is the amalgamation of the three lots into the A.L. and J.E. MacDonald subdivision. That lot appears outlined in heavy lines on Schedule "A". It includes parcel 104 which has a 75 foot frontage on Brookside Road. It includes parcel 104A, a smaller lot, to the rear of parcel 104. It includes parcel HL-B, a larger lot, which includes most of the pit area and some additional lands. It also includes a ten-foot strip of land which runs westward to the Prospect Road boundary from Lot HL-B. This strip gives Lot HL-B 10-foot frontage on, and access to, the Prospect Road.

The portion of Lot HL-B south of the end of the pit is wooded. It is covered with light new growth and some very old hardwood growth in a damaged condition.

The whole of Lot 104B lies between the Prospect Road and the Brookside Road. At Lot 104B's north boundary, road-to-road distance (allowing the Prospect Road lots a 200' depth) is roughly 520 feet. Assuming the same lot depths at the south boundary of Lot 104B, the road-to-road distance is approximately 620 feet. The total acreage involved is 2.665 acres. Map 3, page 50, of Exhibit M-2 (Schedule "B" to this decision) shows the immediate neighbourhood and the zonings surrounding lot 104B.

Parcel 104 is about the 10th property in on Brookside Road from its intersection with the Prospect Road. Schedule "B" shows the immediate neighbourhood of the subject property. It also shows the ribbon-like roadside development that has occurred over the years running southerly on the Brookside Road. Such development has also run southwesterly on the Prospect Road from its intersection with the Brookside Road.

Schedule "C" to this decision (page 20 of Exhibit M-2) shows the zoning area affected by Zoning By-law Number 24 which is now in force and is Exhibit 8. All those schedules contain the subject property seen from different perspectives and different scales.

The west, or rear, line of the lots fronting on Brookside Road is essentially the peak of land in the area. This peak runs north and south parallel to the Brookside Road. On the east side of the Brookside Road, there are some houses at a downward slope to a large valley. The slope, quite pronounced, runs from east to west up to this height of land. Most of the lots fronting on the Brookside Road contain residential single family dwellings. Each dwelling is essentially centered on its own 200' x 75' lot.

The land slopes towards the west from this high point (ignoring the intervening pit excavation) down towards the Prospect Road. The slope is more gradual on the Prospect Road side.

The land to the south of parcel HL-B generally follows the peak and has the same configuration. It widens as the two roads diverge. This land is wooded and is eventually interrupted by Jarrett Drive. This vacant land to the south, has not much to do with the visibility factors concerning this land.

If you stand on parcel 104A and the excavated part of Lot 104B and look north you see:

1. the slope also descending on a gradual scale to a valley;
2. this valley bottoms then rises again and peaks at

the intersection of the Prospect Road and Brookside Road;

3. stores occupy the internal space of the "V" of that intersection;

4. you overlook a Church property and the stores;

5. between the north boundary of parcel 104A and the stores a considerable amount of excavated area, left in a rough condition.

This rough area looks very much like the condition of the Appellant's pit. The Appellant's pit is level. These rough lands to the north of it slope downwards for some considerable distance.

From the neighbours houses fronting on the Brookside Road and backing on the Appellant's pit, the pit is not visible.

From the houses fronting on the Prospect Road and adjacent to the east boundary of the pit, the pit is not visible, either. There is a ridge intervening between the pit and the back of the houses. The pit is an excavation at the peak of the hill and there is an intervening ridge along the common property lines. Many of the houses on the Prospect Road have been excavated down to the grade of the Prospect Road. Many of these backyards have a pit-like appearance near their rear property lines.

If you stand on the Brookside Road at parcel 104 and looks west you see:

1. a driveway going through to the pit area;

2. the Appellant's house and the shed conveniently obscure a great deal of the view of the Appellant's

construction yard.

The Appellant's Notice of Appeal dated September 8, 1989, arrived at the Board on the same date. An undertaking to pay the costs of advertising accompanied the Notice of Appeal.

Under Section 16(1) of the Municipal Board Act, S.N.S. 1981, Chapter 9, the Chairman assigned Board Member Richard L. Weldon, to hear the appeal.

The Board heard the appeal agreeably to its Notice of Hearing at its January 9, 1990, sitting. This sitting occurred at the Council Chambers, Municipality of the County of Halifax, 2750 Dutch Village Road, Halifax.

At the opening day of the hearing, the solicitor for the Appellant moved an adjournment. He moved adjournment on the grounds that he had not received a copy of the Appeal Record until that morning.

Appellant's counsel, Mr. Hill, conceded he had not asked for the Appeal Record until a day or two before the hearing. He did not ask for a copy from the Board until the late afternoon before the hearing. Mr. Hill first received his copy of the Appeal Record from Mr. Cragg, Municipal Solicitor, on the morning of the hearing.

Mr. Cragg objected to this adjournment. He argued that all the documents in the Appeal Record were in the hands of the Appellant anyway.

The Board has powers under Section 23 of the Municipal Board Act, to make Rules subject to Governor-in-Council's approval.

The Board made Rules, effective January 1, 1989, for planning matters.

Rule 17 of those Planning Rules of the Board reads as follows:

> "(1) In accordance with Section 21(2) of the Municipal Board Act, the municipality which is the Respondent to the appeal shall not later than one week prior to the date of hearing:
>
> a) file with the Clerk two copies of an Appeal Record and one copy of the relevant Municipal Planning Strategy, Land-Use By-law, Zoning By-law, Subdivision By-law or Subdivision Regulations;
>
> b) deliver to the Appellant and any other party one copy of the Appeal Record."

In this case, the Municipality had filed with the Clerk of the Municipal Board, one copy of the Appeal Record in time. It had omitted to deliver to the Appellant's solicitor his copy until the date of the hearing.

If the Board had had two copies of the Appeal Record the Board could have given Mr. Hill one copy the eve of the hearing. The Board was not sure that the Appellant had all the documents anyway. The Appeal Record was well-prepared. It was very comprehensive. It dealt with the history of the zoning over the years in this area. The Board was not sure the Appellant had all this excellent detail before him. Mr. Hill requested only one day's adjournment. The Board had set aside the next day for this hearing. Mr. Hill assured the Board that counsel would complete the appeal in the remaining day. In such circumstances, the Board granted the adjournment requested by Mr. Hill.

In hindsight, Mr. Hill's representations were correct. The appeal hearing (both sides) finished in the remaining alloted day.

Both parties active before the Board consented to the jurisdiction of the Board. The Board has reviewed the documents and finds that it has jurisdiction to hear this appeal on its merits.

Mr. Hill called as his sole witness the Appellant, Alvin MacDonald. Mr. Cragg called as his sole witness the planner, Paul Morgan. Many residents living within the zoned area (Schedule "C") attended the evening hearing on January 10, 1990, and gave their views. These included Frederick Guptill, Wayne MacCarthy, Graham Johnson, Suzanne Drapeau, Graham Smith, Brenda Holmes, Susan Smith, Dr. Judith Burnsey and James McFadgen. Graham Johnson spoke in favour of the rezoning application. The rest opposed the rezoning.

In early 1974 the Brookside area described in Schedule "C" formed a part of the General Building Area of the Municipality. On June 18, 1974, the existing Zoning By-law No. 24 passed in its original form.

On August 14, 1974, William MacCarthy, the Appellant's next-door-neighbour, and his wife, sold parcel 104 to the Appellant and his wife, Judy.

Sometime after his land purchase in 1974, Mr. MacDonald started his contracting business. He first owned one dump truck. On August 10, 1984, Mr. MacDonald and his wife bought Parcel 104A.

On October 15, 1985, Mr. MacDonald and his wife bought Parcel HL-B. This purchase completed the Appellant's present acreage. Mr. MacDonald has purchased no lands in this area since that time.

Over the years, Mr. MacDonald's business has grown. He now conducts the office portion (and telephone portion) of his business in his house on parcel 104. Mr. MacDonald has two sheds behind the house in which he stores and repairs some vehicles. Mr. MacDonald stores some equipment and supplies such as P.C.V. Pipe, septic tanks and also mobile equipment outside on all three parcels.

This rezoning application comes as a result of Mr. MacDonald's reaction to complaints to the Municipality. Someone complained that Mr. MacDonald was conducting a trucking business from property in Hatchett Lake. That is another generic name for the subject area.

J. C. Heffler, Chief Building Inspector, wrote Mr. MacDonald on November 17, 1988, in that respect. On November 23, 1988, Donald B. MacLean, the Municipal By-law Enforcement Officer, wrote to Mr. MacDonald. This letter mentioned there might be a new Land Use Strategy for the area, possibly within two years.

By December 14, 1988, Mr. MacDonald had applied to rezone the property in an attempt to respond to these Municipal demands. Paul Morgan, Planner with the Policy Division of the Municipal Planning Department dealt with the application.

Mr. Morgan wrote (on December 14, 1988) Paul Christian from the Community Planning Division of the Department of Municipal

Affairs. Mr. Morgan asked whether the Appellant's rezoning application was in conformity with the policies contained in the Halifax/Dartmouth Regional Development Plan.

On February 2, 1989, Mr. Christian replied:

> "I have reviewed the above request and it appears that a Regional Development Permit is not required. It is my understanding that the intent to rezone is for the purpose of accommodating the existing operation."

Mr. Morgan was evidently not satisfied with this answer since on June 30, 1989, he wrote Mr. Christian again:

> "The commercial use of the property presently includes the storage and repair of vehicles and equipment related to his trucking and excavation business, storage of septic tanks, and the excavation of fill.
>
> Could you please provide written confirmation as to whether a Regional Development Permit will be required."

In July, Mr. Christian, at this time, replied:

> "...a Regional Development Permit is required for a commercial operation. Issuance of this permit would be contingent upon compliance with the requirements of the Halifax/Dartmouth Regional Development Plan, the Department of Health and Fitness, the Department of Environment, the Department of Transportation and Communications and the Municipality of the County of Halifax."

Mr. Morgan then proceeded to contact all these various agencies.

Officials of the Department of Transportation had no objection to this site.

Mr. Morgan correlated the results of his efforts in studying this rezoning application in a report, dated July 10, 1989. His Planning Report starts at page 45 of Exhibit M-2. In this Planner's Report, Mr. Morgan recommends that the rezoning application be rejected.

In the information portion of that Section there are these thoughts:

> "Mr. MacDonald operates a trucking and excavation business from the rear portion of the property in conjunction with his residence which fronts on Brookside Road.
>
> ... A complaint received from a neighbouring resident instigated an investigation by the Building Division. The Division has advised Mr. MacDonald that the business does not comply with the zoning requirements and is liable to prosecution. He has subsequently applied to rezone the property from R-2 to C-1.
> ... Mr. MacDonald purchased his residence at 65 Brookside Road on August 14, 1974. He has stated that he has stored trucks on the property since June, 1979. His commercial use of the property presently includes the storage and repair of vehicles and equipment related to his business, storage of septic tanks, and excavation of fill.
>
> [page 46].
>
> Lot 104B is a consolidation of three parcels of land. Lot 104 was originally part of the George Yeadon Subdivision, approved in 1970. In 1984, Mr. MacDonald purchased Parcel 104A and consolidated it with the original lot. Parcel HL-B was then purchased and consolidated with this lot in 1985.
>
> Site Description
>
> ... A gravelled driveway extends from the road to a garage immediately to the rear of the house. The garage is used for vehicle storage and repair. A compressor and tools for vehicle repair are kept inside. The approximate location of these structures and structures on abutting lots is illustrated by Figure 1.
>
> An open storage area is located to the rear of the garages, on Parcel 104A and extends in a southerly direction onto Parcel HL-B. Commercial vehicles and materials associated with Mr. MacDonald's business are stored here. At the time of the site visit, 2 dump trucks, 1 flat bed trailer, 1 dozer and numerous septic tanks were observed on site.

Lands behind the garage have been excavated. Coverage extends from the northern property line in a southerly direction for an estimated distance of 300 to 325 ft., across the full width of the property (120 to 140 ft.). The depth of excavation ranges from 3 to 4 feet near the northern property line and quickly increases, reaching depths of 15 to 20 ft. at the southern perimeter. The pit created has a relatively level bottom throughout with steep embankments around the periphery. Soils have been left largely exposed except for the placement of rocks and grass cover on some areas of the embankment. This appears to have been done to stabilize soils. However, soil erosion is evident in many locations.

Lands to the south of the pit remain undisturbed and forest covered. The area is a high point of land with grades falling towards Brookside and Prospect Roads. The Jarrett Heights subdivision is presently being developed to the south of the property.

Site Visit January 11, 1989.

Analysis

The commercial use of the property, for which Mr. MacDonald has requested Council's approval, raises concerns about the orderly development of the community and compatibility with surrounding land uses.

Minutes of the Planning Advisory Committee of May 27, 1974, indicate that the application to rezone the Brookside Road area to R-2 was made by a petition of area residents. The zoning was intended to promote development which was consistent with residential development located in the area. Residential subdivision had emerged at the time, but large undeveloped properties were also included within the R-2 boundaries. Existing development patterns may, therefore, have been influenced by the zoning implemented.

A planning process to prepare a municipal planning strategy and land use by-law for District 4 has been underway for approximately two years. the Public Participation Committee (PPC) responsible for preparing the plan has tentatively proposed that the area be designated for residential purposes. It is anticipated that completion of this process will take at least another year.

As illustrated by Map 3, residential development has occurred along the Brookside Road and Prospect road on lands abutting the applicant's property. Based on plans of subdivision reviewed, the residential uses appear to have been established prior to Mr. MacDonald's business. Newer residential subdivisions have also been developed on local streets, extending from Brookside Road, in close proximity to the applicant's site. These circumstances would suggest any other uses permitted in this area should be compatible with the established residential environment.

A trucking and excavation business is not considered to be compatible with a residential neighbourhood. The use involves outdoor storage of commercial vehicles, equipment, and construction materials which detract from the neighbourhood aesthetics. Although the storage area is located on the interior portion of the property and is not visible from Brookside Road, it is surrounded by residential properties. The size of the property also allows for considerable expansion of the existing operation. This is an important consideration in light of the fact that the scale of the operation appears to have grown. Mr. MacDonald has stated that initially, only a dump truck was stored in the driveway. At the present time, a single axle and tandem dump truck, a dozer, a flat bed trailer and two backhoes are stored on site when not in use. Mr. MacDonald has stated that in the future, he may also wish to build a larger repair shed in the area behind the garage.

The state of the pit itself greatly exacerbates the situation. Steep and deep embankments have been created along the rear property lines of abutting residents. Soil restoration efforts have been minimal...

[page 48]

The Department of the Environment has estimated that earth removal has occurred at a rate of 1,000 cubic yards per year for the last five years. This has been in contravention of its regulations which require a permit for a pit operation. The department concurs with staff's opinion that erosion control measures are inadequate. Mr. MacDonald has been advised that the pit operation does not meet with provincial separation distance guidelines. [The N.S. Department of the Environment Pit and Quarry Guidelines require a minimum 300 ft. separation distance from residential properties, unless written approval is received from each affected property owner.] A permit application for this pit will not be issued unless written approval is received from Mr. MacDonald's neighbours. Should this permission not be forthcoming, the Department of the Environment has

> requested that Mr. MacDonald submit a phase-out plan for the pit operation which would provide information on the final slopes and stabilization measures to be used to control erosion, as well as the time frame necessary to complete the plan.
>
> ...the operation does not appear to provide a threat to existing wells or sewage disposal systems.
>
> The Department of Transportation has stated that the existing driveway at 65 Brookside Drive meets with its stopping sight distance requirements for a commercial use and, therefore, does not object to the rezoning...
>
> The Department of Municipal Affairs has stated that, pursuant to the Halifax-Dartmouth Regional Development Plan, a Regional Development Permit is required for a commercial operation. Issuance of this permit would be contingent upon approval of the Departments of Health and Environment.
>
> Conclusion
>
> There is an established residential community in the Brookside Road area which is supported by R-2 zoning. The applicant's site is bordered by residential properties. Due to its nature and proximity to abutting properties, a trucking and excavation business is not considered to be a compatible use. It is, therefore, recommended that the application be rejected."

The refusal decision of Council passed by a vote of 18 for, four against and one abstention.

The Appellant qualifies as an Appellant both under Section 63(1)(a) and 63(1)(b) of the Planning Act. He is a person aggrieved by the decision of Council refusing to amend the LUB. He is also the Applicant refused his L.U.B. amendment by Council.

In this appeal there is no Municipal Planning Strategy (MPS) governing the land in question. Therefore, the Board must test the decision of Council under Section 63(6) of the Planning Act which reads as follows:

> "Where there is an appeal from a decision of council with respect to a zoning by-law in force by Section 112, the Board shall not interfere with the decision unless the decision of the council is inconsistent with or unnecessary for the protection of the best interests of the municipality."

If the Board were to determine that the appeal was not allowable under Subsection 63(6) this determination does not necessarily conclude the appeal. On such finding, the Applicant might then try to rely on Subsections 63(7)(a) and (b) of the Planning Act as additional avenues to try to succeed in his appeal.

> "Notwithstanding subsections (5) and (6), the Board may allow an appeal by an applicant if, in the opinion of the Board,
>
> a) the applicant would suffer undue hardship; or
>
> b) extraordinary and compelling circumstances are present.

Section 112 of the Planning Act also is germane to this appeal:

> "(1) A zoning by-law or an official town plan passed under any former Town Planning Act, which by-law or plan was in force immediately before the coming into force of this Act, shall continue to be in force for a period of thirty months after the coming into force of this Act and for such further period as the Minister may, by order, determine with respect to the By-law or plan, unless sooner repealed, and they are and are deemed to be repealed upon the coming into force of a municipal planning strategy and land-use by-law.
>
> (2) A zoning by-law or official town plan to which subsection (1) applies may be amended, revised or repealed in the same manner as a land-use by-law or municipal planning strategy, respectively, may be amended, revised or repealed."

Section 111 also of the Planning Act applies in this case:

> "(1) The Halifax-Dartmouth Metropolitan Regional Development Plan and Regulations, as amended, made pursuant to the former Planning Act, continue in force.
>
> ...
>
> (5) In an area where the Regional Development Plan applies and no municipal development permit is required by this Act, no one shall undertake a development without first obtaining a regional development permit unless such development is of a kind exempted under sub-section (9).
>
> ...
>
> (7) A regional development permit may be granted subject to such conditions to ensure conformity with the Regional Development Plan as may be determined by the Director.
>
> (8) No development permit shall be issued inconsistent with the Regional Development Plan."

The above are the prime legislative sections dealing with this particular appeal.

Sometime since late 1974, the Appellant used his residential land commercially in a manner prohibited under the LUB. The Appellant also operated a pit and a quarry without a permit required under Department of Environment legislation and regulations. For many years the Appellant's illegal use of his land both continued and grew without objections from any of his neighbours.

Some sort of dispute arose in late 1988 between the Appellant, Mr. MacDonald, and his next-door neighbour, Mr. McCarthy. This is the same Mr. McCarthy who sold Mr. MacDonald the lot in the first place. This dispute, according to Mr. MacDonald, came about because of a water intrusion from Mr.

McCarthy's property over Mr. MacDonald's driveway. The influx of water caused icy conditions on Mr. MacDonald's driveway in the winter time. After this particular dispute arose, Mr. McCarthy complained to County officials of Mr. MacDonald's commercial uses of his property. These uses were in violation of the L.U.B. requirements for residential property.

Before purchasing the large bulk of land for pit purposes in 1985, Mr. MacDonald made inquiries. He asked persons in the County Engineering Department whether he needed permits for his pit operations. He also inquired at the office of the Department of Environment. Mr. MacDonald said people at both places said there were no permits required. Subsequent to those conversations, Mr. MacDonald bought the large bulk property, portion HL-B, which contains the pit and wooded lands.

The public complained of the quarry operation. Mr. MacDonald, sometime before the date of this hearing and after the initial complaints in 1988, ceased the use of the pit. Mr. Morgan's Planning Report describes the pit as it exists now. It is level on the bottom, steeply sloping sides on three sides, east, south and west and open towards the north.

Mr. MacDonald alleged many of his neighbours in the Residential Zone run businesses from their homes. He said houses on the Brookside Road, in Brookside Mews, the adjacent subdivisions, and throughout the zoned area, contain commercial uses in the R-2 zone. People were using their houses as offices and business phone stations. They were using their grounds for storage of whatever business vehicles were necessary.

Mr. MacDonald's place has no business sign. His name appears on a rural route mailbox on the side of the Brookside Road. In this he differed not from those of his neighbours conducting prohibited commercial uses in the R-2 Zone.

Mr. MacDonald conceded that, with one possible exception, none of the places he listed as other prohibited businesses in the R-2 Zone were running as large an operation as he was. He said at least one of his neighbours was in a similar business to his.

Mr. MacDonald alleged Mr. McCarthy was running a commercial woodworking business in his basement. Mr. McCarthy denied that. Mr. McCarthy admitted that he took part-time employment and that he did woodworking in other people's homes. In his conduct on the stand, Mr. McCarthy displayed a personal animosity, not related to planning, toward the Appellant, Mr. MacDonald.

None of the other residents who spoke against this rezoning application showed any personal animosity to Mr. MacDonald. Many commended him as a good businessman and a good community man who lived in the community and participated in community affairs. Most of them expressed concerns that his use of his land was an unwarranted commercial intrusion into a residential area. All citizens who spoke against the rezoning were dead against the pit operation. A perusal of the Appeal Record shows that the pit operation was a major point of objection to many people.

Graham Johnson spoke in favour of the Appellant's rezoning. He said the community had an interest in seeing that the employment at this site continue. Mr. Johnson said he had been subjected to a Municipal Board hearing in which he had lost a regional development permit. As a result of this loss, Mr. Johnson said he had to lay off 8 employees in his business.

Mr. Johnson said that he had driven past the Appellant's property on many occasions. In the years he had driven by the land he said he didn't even know it contained a commercial operation. He only learned of the land and commercial use when the public rezoning application process and advertisements highlighted the situation. Mr. Johnson said you still can't see the commercial aspect of the Appellant's operation from the Brookside Road on which it fronts.

This Brookside area is long overdue for a MPS. The present Planning Act passed in 1983. Section 112(1), as it was originally passed, called for a MPS to be in position in every municipality within thirty months of the coming into force of that Planning Act. A thirty month interval is two and one-half years. The Planning Act provides for a MPS review every five years at the least.

The By-law here is unsupported by any MPS since 1974. That is at least 17 years. It has been amended in that time.

The general theme of the citizen disapproval of this rezoning is that this by-law was passed to make Brookside a purely residential area. On any subsequent review of the Zoning By-law the community approach opted for total residential use only.

The Board accepts that many community members (perhaps most) feel threatened by any commercial intrusion in this long standing residential zone. This R-2 Zone stretches basically from Hatchett Lake south to Moose Horn Lake and beyond (See Schedule "C").

Since 1974, there has been considerable residential development in the area. The area has radically changed in those 16 or 17 years from mostly unoccupied to considerably occupied.

Members of the community may believe that they have essentially a residential community. From the evidence before it, the Board notes many inhabitants of the zoned area have commenced commercial uses of their land since the area attained residential zoning. They did this whether or not permitted by the Zoning By-law. Mr. MacDonald has flagged some of these situations. Perhaps others exist.

In any event, the community is not totally residential. There is a mixed commercial use, legal or illegal, in a house-commercial use-type of environment.

The Board finds, on the evidence before it, that the pit operation is at an end. The only pit work for Mr. MacDonald to do will be stabilize the pit to satisfy the Department of Environment legal requirements for an exhausted pit. Because of site constraints, Mr. MacDonald cannot continue his pit operation unless he receives written consent from all his neighbours within 300 feet. Many of these neighbours have signed petitions that he not proceed with the rezoning. Many of these neighbours have spoken against Mr. MacDonald's receiving the rezoning. The Board finds, to a high degree of probability, Mr. MacDonald will not receive such unanimous written consent to continue the pit. Therefore Mr. MacDonald will not be able to receive a Department of Environment permit to continue his pit excavations.

Mr. MacDonald has said that he has no intention of proceeding with the pit operation. He now proposes to build a larger shed for repair and storage of his vehicles on a portion of 104A. He proposes to add no more vehicles to his operation. He said he is 45 years of age. He said he plans to continue his present business on the current level. He said he presently employs his son, his wife, (part-time) and one other machine operator besides himself.

Mr. Cragg had Mr. MacDonald concede he had no further need for commercial use of Lot HL-B south of the pit. This end of the pit is basically in line with the 10-foot strip of land leading west to the Prospect Road. Therefore, on that part of Lot HL-B, Mr. MacDonald had no desire to continue with his rezoning application.

Mr. MacDonald said County officials left him under the impression he could only apply for rezoning of his total amalgamated lot of land, Lot 104B.

Mr. MacDonald said he could use the pit for storage of his vehicles. He conceded under cross-examination by Mr. Cragg, he could build all buildings he desired on parcel 104A. This was basically the area north of the straight line westward prolongation of the southernmost boundary line of parcel 104.

Mr. Morgan suggested that in order to rezone to "Commercial" Mr. MacDonald had to have "Commercial" frontage on a public road. If this is correct, parcel 104/104A would be the minimum land Mr. MacDonald could rezone to achieve his objectives.

Mr. Morgan felt Council could not rezone parcel 104A, alone, "Commercial" because it had no road frontage.

Except for Mr. McCarthy, most of the people nearby testified that they were only occasionally disturbed by the Appellant's warming diesel engines on his equipment. They had no real complaint with the operation as presently carried on by Mr. MacDonald.

Opponents of the rezoning emphasized their concern with the "worst case scenario" that could occur under the C-1 zoning.

Many residents suggested that Mr. MacDonald pick up his operation and move it to the other side of the Prospect Road. This area was in a General Building Area. In that area, there were many lots of land for sale. On any of these, Mr. MacDonald could store and repair his vehicles and have his house.

The Board deals first with Mr. Morgan's contention that the lot, if it is to be rezoned, must have road frontage. Subsection 15(3)(a), at page 38 of the L.U.B., calls for:

"Lot frontage minimum   60 feet."

Lot frontage is not defined in the L.U.B. definitions. Definition 2.28 reads:

> "FRONT means to abut on a street, and a building shall be deemed to abut on the street opposite to its principle entrance, or if such entrance is not opposite to a street, then upon the street from which it gains its principle access."

Definition 2.57 reads:

> "STREET means any street, road, highway, or travelled way or portion thereof, within the Municipality."

Definition 3.4 reads:

> "Lot to Abut on Street
>
> Every lot or part of a lot used for residential purposes shall abut on a street, and a building shall be deemed to abut on the street opposite to its principal entrance, or if such entrance is not opposite to a street, then upon the street from which it gains its principal access."

There is no such provision (See 3.4) for commercial lots. In the Zoning By-law itself no specific requirement appears that the lot frontage for a C-1 Zone be on a street.

The Board made a decision in Russ J. Andrews v. The Municipality of the District of East Hants and Pioneer Projects Ltd. (NSMB-586-87-P) (1988) 7-B (Vol. 1) M.B.D. 290 that the zoning granted had to front on a street. The Municipality appealed this decision to the Appeal Division of the Nova Scotia Supreme Court in The Municipality of the District of East Hants v. Russ J. Andrews and Nova Scotia Municipal Board, Respondents, and Pioneer Projects Limited, Third Party (S.C.A. No. 01986) (unreported).

The Appeal Division quoted this phrase from the Board's decision:

> "In order to uphold the Municipality's position, the word "Lot" must be given more than one meaning within the L.U.B. When a word is specifically defined in the definition section there needs to be a clear intention

> shown that the word is to have more than one meaning. Such a clear intention is not shown here.
>
> In the Board's opinion, the L.U.B. requires that the land which is being rezoned Commercial Highway (C2) Zone must abut a public street or highway and it is not sufficient that it be part of a lot which does abut..."

Hart J.A. specifically disagreed with this finding of the Board. At page 7 Mr. Justice Hart said:

> "It seems to me that the Board when following the rather technical argument that the part of the lot rezoned does not in fact front on a highway as required by the land-use by-law was not giving effect to the reasonable intent of the municipal planning strategy as it related to the use of the environmental open space... It should be pointed out that most zones correspond with the lot lines of subdivided property but a floodplain zone simply follows the contour of the ground relating to the normal and abnormal levels of flooding to be found in an area."

And further at page 12:

> "It does not appear that the municipality in passing this by-law intended that there could be no access from a highway to a part of a lot zoned for commercial purposes simply because the commercial area of the lot was separated from the highway by a narrow strip zoned for floodplain low potential...No development would be permitted upon the part of the lot zoned floodplain except that which is necessary for access to the remainder of the lot zoned commercial.
>
> I agree with the view taken by the planning coordinator of the municipality and find that the Municipal Board was in error when it reached the conclusion that the proposed rezoning was not reasonably consistent with the municipal planning strategy of the District of East Hants."

Mr. Justice Hart then went along further to order rezoning of the former R-2 property to Highway Commercial. He withdrew the Floodplain zone adjacent to the highway from the Commercial zoning. His order allowed the commercial use of the property between the rezoned land and the highway for access and egress only. This is a commercial use of the property zoned "Floodplain".

The opinions expressed by Mr. Justice Hart seem at variance with the categorical opinions of Mr. Morgan. If they were truly at variance, the Board would have no option but to follow the decision of Mr. Justice Hart.

In the Andrews, there was an MPS. In Andrews, the Board's duty was to determine whether or not the decision of Council was reasonably consistent with the intent of the MPS.

In the present case the comparable duty to the Board is to determine two things:

1. Was the decision of Council unnecessary for the protection of the best interests of the municipality? and/or

2. Was the decision of Council inconsistent with the best interests of the community?

This is an extremely different test from that in Andrews,. Mr. Justice Hart in his decision in Andrews, placed a good deal of emphasis on the concept of "reasonableness". The word "reasonably" does not appear in Subsection 63(6) of the Planning Act. It does appear, for example, in Subsections 63(5) and 63(3). These are the usual Subsections the Board applies in a rezoning appeal in an area in which there is an existing MPS. The Board therefore can and does prefer Mr. Morgan's interpretation of the Zoning By-law. It agrees that any C-1 zoning in this matter must include the frontage on the Brookside Road. C-1 cannot be relegated, for example, as suggested by Mr. Cragg, to parcel 104A only.

This position is consistent with the present commercial use of out-buildings on parcel 104. Mr. MacDonald also uses a portion of his house on parcel 104 for business office purposes.

Mr. Cragg has argued that what Mr. MacDonald does on his property is a commercial use of the property. He says these commercial uses contravene the L.U.B. He cited for those purposes the Municipality of the County of Kings v. Reid et al 39 M.P.L.R. 161. In that case, Mr. Justice Grant decided that Rocky Reid was carrying on an automobile repair business on the premises. In that case, Mr. Justice Grant set out several criteria of commercial use.

Without detailing those criteria, the Board had regard to them when it determined that Mr. MacDonald used his property commercially. The Board also used Mr. Justice Grant's criteria on certain other properties in the general R-2 Zone to determine their commercial use.

Mr. Cragg argued that the decision of Council was within the best interests of the Municipality. He cited, in support of this, the decision of the Board, Lynk v. County of Cape Breton (1986) 5-B M.B.D. 667.

The headnote of that decision states the Board's decision on the first issue under 63(6):

> "The predominant land-use in the vicinity is residential in character and this predominant use is reflected in the existing zoning for the area (R-1). The Appellant's business use is probably a non-conforming one and is not

> compatible with the residential use in the adjacent subdivision. It would not constitute good planning to rezone to C-2 simply because it would open up the possibility of the Appellant or a successor in title using the property for allowable uses under the C-2 Zone that are less compatible with the neighbourhood residential uses. If it does not constitute good planning then it is not in the best interests of the Municipality."

Mr. Cragg urged the Lynk case was on all fours with the present case.

The ongoing use in the Lynk case was the retail sale and repair of secondhand used furniture and household appliances. The use proposed for expansion was a non-conforming use. The site had been in existence before the subdivision in which the complainant lived. The planner in the Lynk case, as well, recommended Council reject the application. He wished to postpone the development for a development agreement when the MPS came into force in the municipality.

The planner expressed an opinion that the application for rezoning was not in the best interests of the municipality.

At page 687 of Lynk the Board said:

> "It is also the Board's opinion [p. 688] that the existing business use of a portion of the Appellant's property is not compatible with the residential use of property in the adjoining Charlestown Subdivision."

And further on page 689 the Board said in Lynk:

> "On the matter of what constitutes the best interests of the municipality, the Board adopts the following statement from Page 31 of Vol. 1 of the P.P.A.B. Reports respecting the decision of the Provincial Planning Appeal Board in the appeal by the Lord Nelson Hotel, viz:
>
>> "The Board agrees with the Appellant's submission that the phrase "the best interests of the

> Municipality" is to be interpreted in the light of planning considerations and that the main guidance is to be obtained from professional qualified planners in various fields such a urban economics, urban design, city planning, etc.
>
> The Planning act is designed to promote the orderly development of municipalities having regard to proper planning principles. The Board believes that if sound planning principles are followed the best interests of the municipality will be served."
>
> In this case the Board agrees with the planner, Kenneth Smith who testified that the Council's decision is refusing to approve the Appellant's application was in the best interests of the Municipality.
>
> It is one thing to have the Appellant's property continue in its operation as a legal non-conforming use which use is not compatible with the adjoining residential uses as this continued non-conforming use is protected by the Planning Act. It would, however be another thing to permit this incompatible non-conforming use to expand by rezoning the Appellant's entire property to C-2 Zone."

The Board agrees with Mr. Cragg when he says there are many similarities between the facts of the present case and the facts of the Lynk case.

Mr. Hill cited Erfani v. County of Halifax (1988) 7-B (Vol. 1) M.B.D. page 143. This was a case dealing with a rezoning made under a MPS. He was citing it for the principal expounded in the headnote:

> "Here Council proceeded on the basis of incorrect facts and placed undue emphasis on the worst case scenario."

In Lynk the Board made a finding that the use was incompatible with the residential nature of the neighbourhood.

The evidence here shows the Board that the use that Mr. MacDonald puts to his lot is not incompatible with the neighbourhood. The slope buffers his use of his property (to the west) from houses located along the Brookside Road. His house and out-buildings on portions of parcels 104 and 104A buffer Mr. MacDonald's commercial use from view from the Brookside Road looking east from the front of parcel 104. Homeowners with houses fronting on the east side of the Brookside Road have to go to their rear lot lines to see Mr. MacDonald's exposed commercial operation. Only when he moves vehicles in and out of his property over his driveway, can they easily see his commercial activity.

To the north of the pit there are several commercial properties. There are institutional properties, such as a church, and also residential properties. There is waste land that goes between his north line and any buildings built along the Prospect Road. They are all on a lower level then the open north end of his "pit". The intervening waste lands are in the same (or worse) state of repair than Mr. MacDonald's pit.

The grade of the pit and the natural slope shelter the properties fronting on the Prospect Road and backing on Mr. MacDonald's property from easy sight of his commercial operation. Respecting the Prospect Road properties, anything on MacDonald's land that appears commercial will be on a higher elevation than the houses' roofs.

The problems that have arisen between Mr. McCarthy and Mr. MacDonald are of no concern of this Board. They are not directly related to Mr. MacDonald's current use of his property.

The MacDonald pit operation was incompatible with the neighbourhood. The regulatory structure surrounding the operation of pits near houses demonstrates this. Mr. MacDonald has stopped his pit operation. Mr. MacDonald cannot take up the pit operation again except to restore the pit site.

The pit operation conducted by Mr. MacDonald is at an end. Under the legislation he must bring the pit into a more restored condition.

The sound nuisance from Mr. MacDonald's operation is tolerable. It affects only the neighbours most closely adjacent to it.

The neighbours throughout this long large zoned area seem concerned with the "worst case scenario".

Mr. MacDonald proposes to build a larger garage on the property. He has a substantial, relatively modern, house on his property. It is unlikely that he would tear down these existing valuable buildings to accommodate a "worst case" scenario.

This rezoning causes a problem to the neighbourhood. The failure of the Municipality, the people in the community, and the planners concerned to pay proper attention to the deadlines suggested in Section 112 (and elsewhere) in the Planning Act contribute to the problem. All should co-operate to get their community planning on schedule and an MPS in position.

Under an appropriate MPS and non-obsolescent L.U.B., the Municipality could control, perhaps, by development agreement, an operation such as Mr. MacDonald's. Council could exercise control to accommodate both the needs of Mr. MacDonald and his neighbours concern for the residential character of their neighbourhood.

The Board believes that the area is not as residential as the residents would like to think. Home based type commercial uses have intruded into the area over the long years that the present Zoning By-law has been in effect. That By-law is long overdue for folding into a MPS in accordance with the terms of the Planning Act.

If the Board were to order only the minimal required rezoning (given the views of members of the Community), it would order parcel 104A rezoned. The Board, with reluctance, must agree with Mr. Morgan that because of the land usage and because of his current interpretation of the Zoning By-law, that if it orders any rezoning, it must rezone at least a combined parcel 104/104A. Mr. Cragg suggested that if the Board rejected his representation and ordered rezoning, parcel 104/104A, is the maximum area it should rezone.

Mr. MacDonald has conceded he needs nothing south of the 10-foot strip to the Prospect Road in a C-1 Zone. The Board will therefore give no consideration for rezoning in that area.

An animosity has grown up between at least two neighbours in this area. There is a temptation to turn large vehicles or store large vehicles in the pit area. This would be a commercial use under the Reid case on account of these facts. The Board is reluctant not to allow at least a portion of the pit for turning of vehicles.

The Board sees an easy definition of any putative area of rezoning of parcel HL-B. The south boundary could be either the north or the south boundary of the 10-foot strip in a straight line prolongation across parcel HL-B. In view of the attitude of many of the citizens, the Board will reduce the area that boundary would enclose.

The Board will suggest that the rezoning area end at a line in the pit. It would draw that line from the north east corner of the lot on the Prospect Road immediately north of the north boundary of the 10-foot strip. It would draw the line from the northeast corner in a straight line across the pit to the northwest corner of the third lot south of parcel 104. This would constitute the south boundary of the C-1 Zone. The Board views this as a compromise zone boundary made necessary by risk of a casual commercial violation after rezoning. This zoning boundary location also makes it clear that there will be no possible commercial use of the present working face of the pit.

That is the maximum extent of any zoned area the Board would order on this appeal.

If it is to come to this result, the Board must make findings under Subsection 63(6)of the Planning Act. The Board is unable to interfere with the decision of Council under Subsection 63(6) unless it finds that the decision of Council is inconsistent with, or unnecessary for, the protection of the best interests of the Municipality.

In this case, the expert planning witness gave no opinion of what the best interests of the Municipality are. He did recommend against the rezoning.

The planner, although he made inquiries into the Regional Development Permit requirements, has expressed no knowledge of what those requirements are. Those requirements easily could have satisfied the most vehement of the rezoning application resistors. These requirements should have been at least in summary form before Council. Then Council could see if the requirements would accommodate any, or many, of the objections to the rezoning.

Probably the best interests of the Municipality are consistent with the decision of Council.

The present use of Mr. MacDonald's property is compatible with the neighbourhood.

The evidence has shown that the complaints about Mr. MacDonald's illegal use of his property did not arise out of harm caused by the actual use of the property. The complaint arose from motives other than the desire for good planning.

The citizens were not angry about the present use of MacDonald's property but only for the "worst case" scenario. The Board in this case has discarded the "worst case" scenario.

Even if the decision of Council is not inconsistent with the best interests of the Municipality, that does not end the matter. The size of the rezoning allowed, the way it is buffered, the failure of the Planner to fully inform Council on all planning matters, indicate to the Board that Council's decision is unnecessary for the protection of the best interests of the Municipality. In such event, the Board may interfere with the decision of the Council. In this case, the Board will exercise its discretion and will interfere with Council's decision.

Given this result, the Board will not base any determination on Mr. Hill's argument concerning the further right to succeed in this appeal. He has alleged under Subsections 63(7)(a) and 63(7)(b) of the Planning Act that he should succeed as well. Suffice it to say that the Board would not find for the Appellant under Subsection 63(7)(a). The Board agrees, while there may be hardship on the Applicant, there is no undue hardship.

The Board will not so dismiss Mr. Hill's argument under Subsection 63(7)(b) as it dismissed the Appellant's argument under Subsection 63(7)(a). It keeps an open mind on Subsection 63(7)(b). The extraordinary and compelling circumstances in this matter might be the advice that Mr. MacDonald says he received (and the Board believes he received). He received advice from persons in the Planning Department and persons in the Department of Environment. Then he made his final land purchase in 1985. Despite the immediately preceeding portions of this paragraph, the Board repeats it will not determine this appeal under Subsection 63(7)(b).

> Therefore under Section 63(4)(c) of the Planning Act the Board allows the appeal. The Board instructs the Council to amend the By-law in the manner prescribed by the Board.

The rezoned area shall include parcel 104, parcel 104A and parcel HL-B south from parcel 104A to a straight line formed by joining the northeast corner of the Lot on the Prospect Road just north of the 10-foot strip and the northwest corner of the Lot on the Brookside Road, three lots south of parcel 104, as shown on Schedule "A" of this decision.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 31st day of January, A.D., 1990.

RICHARD L. WELDON
Member.

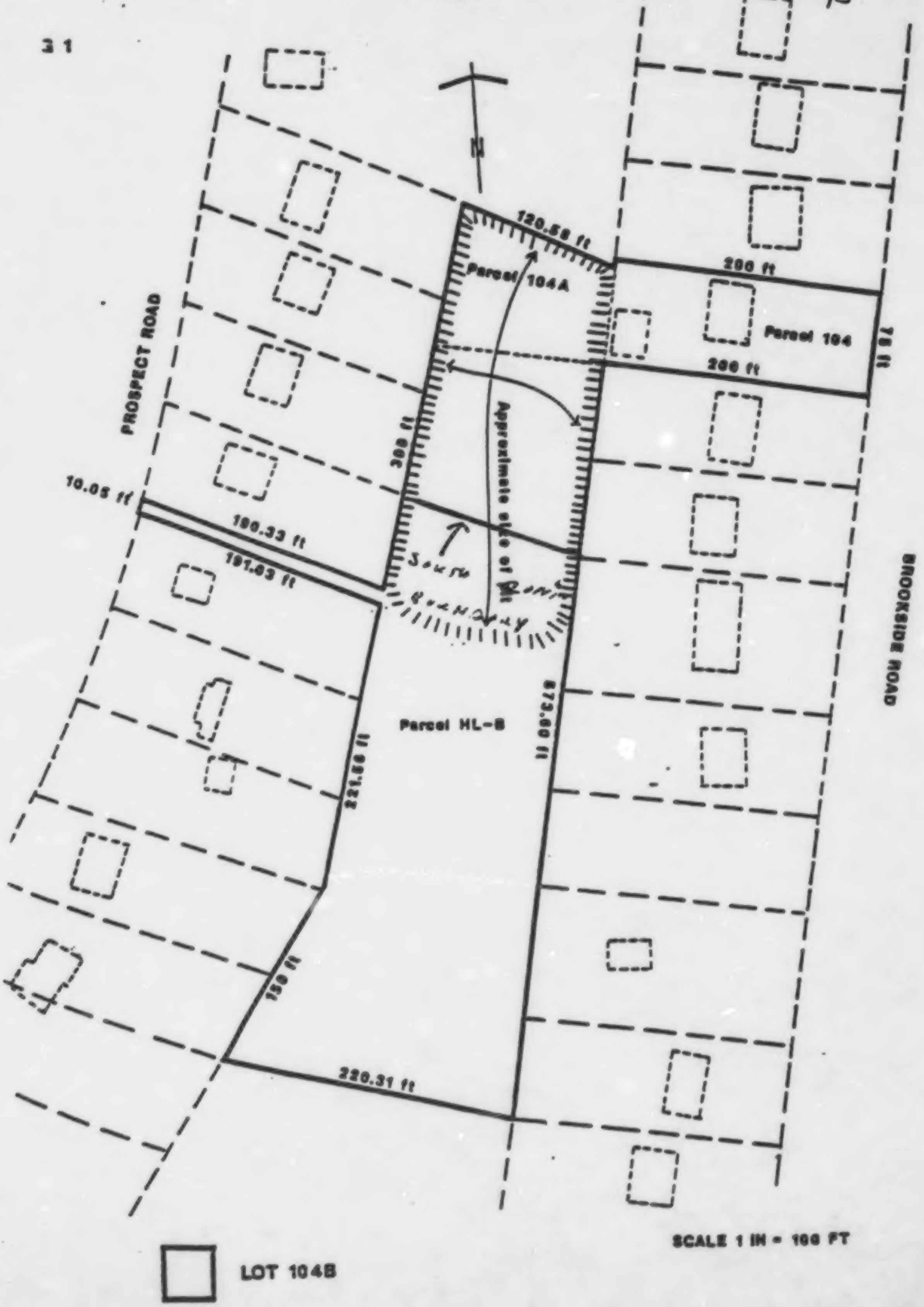
NOVA SCOTIA MUNICIPAL BOARD.

SCHEDULE A

-7-

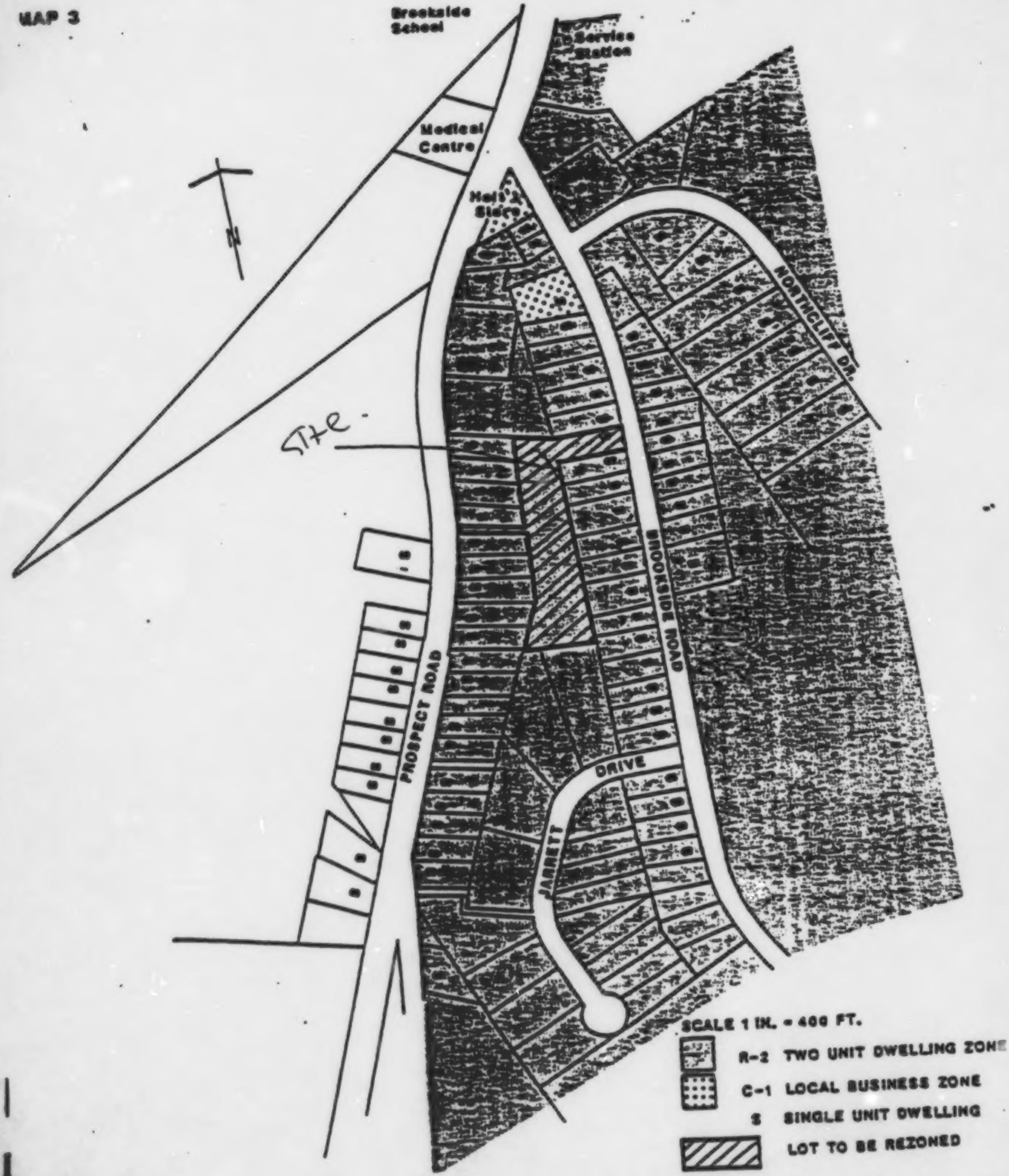
15

31

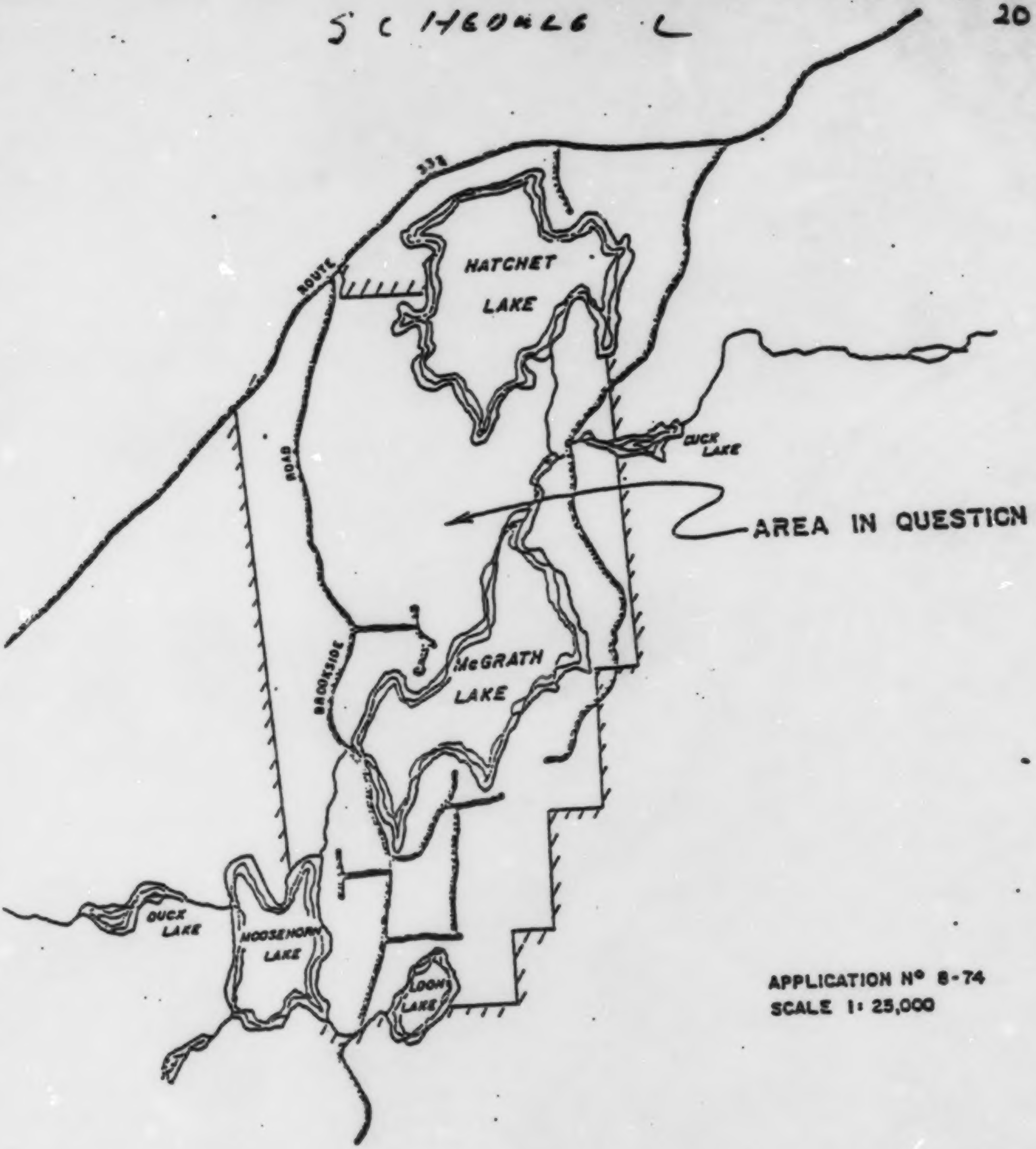

N
120.58 ft
Parcel 104A
200 ft
Parcel 104
75 ft
200 ft
PROSPECT ROAD
300 ft
Approximate size of pit
10.05 ft
190.33 ft
191.03 ft
South Boundary
BROOKSIDE ROAD
673.00 ft
Parcel HL-8
221.56 ft
150 ft
220.31 ft
SCALE 1 IN = 100 FT
LOT 104B

SCHEDULE B

MAP 3


Brookside School
Service Station
Medical Centre
Hall & Store
N
NORTHCLIFF DR.
Site
BROOKSIDE ROAD
PROSPECT ROAD
JARRETT DRIVE
S
SCALE 1 IN. = 400 FT.
R-2 TWO UNIT DWELLING ZONE
C-1 LOCAL BUSINESS ZONE
S SINGLE UNIT DWELLING
LOT TO BE REZONED

SCHEDULE C


ROUTE 333
HATCHET LAKE
ROAD
DUCK LAKE
AREA IN QUESTION
BROOKSIDE
McGRATH LAKE
DUCK LAKE
MOOSEHORN LAKE
LOON LAKE
APPLICATION N° 8-74
SCALE 1: 25,000

PROPOSED AMENDMENT TO APPENDIX C OF THE ZONING BY-LAW OF THE MUNICIPALITY OF THE COUNTY OF HALIFAX TO CHANGE FROM GENERAL BUILDING ZONE TO R-2, RESIDENTIAL TWO FAMILY DWELLING ZONE.

NATIONAL BOWLING LANES v. TOWN OF NORTH SYDNEY

PLANNING - L.U.B. AMENDMENT - REFUSAL TO PERMIT VIDEO GAMES IN A BOWLING ALLEY - MIXED USE ZONE - UNDUE HARDSHIP - PLANNING ACT, S. 63(7).

Bowling Alley applied to amend L.U.B. to permit installation of video games in large scale commercial recreational use buildings in the Mixed Use Zone. Council had originally prohibited video games in this zone which is adjacent to a residential area because of concerns about increased vandalism.

HELD: Appeal dismissed.

The intent of the M.P.S. is to protect the residential neighbours adjacent to the Mixed Use Zone from incompatible land uses. Council has determined that video games are an incompatible land use. Council reasonably carrying out the intent of the M.P.S.

The evidence does not support a finding that the Appellant would suffer undue hardship or that extraordinary and compelling circumstance exist.

NSMB-41-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act by **NATIONAL BOWLING LANES** from a decision by the Council of the **TOWN OF NORTH SYDNEY** made October 19, 1989, refusing to amend the L.U.B. to permit the operation of video game machines.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: WAYNE FUDGE, Local Manager of National Bowling Lanes, on its behalf;

DAVID RYAN, Q.C., on behalf of the Town of North Sydney.

HEARING DATE: January 29, 1990.

DECISION DATE: February 7th, 1990.

DECISION: Appeal dismissed.

DECISION

National Bowling Lanes, the Appellant, opened a bowling alley in North Sydney in September, 1988. The Appellant installed video games in the building, a practice which they have followed throughout the Province. The income from the video games pays for the salary of one staff member.

The Town advised the company that video games were not permitted in that part of Town. The Appellant removed the video games in February, 1989. The Appellant then applied for an amendment to the Land Use By-law (L.U.B.) to permit video games in the bowling alley.

On October 19, 1989, Council refused the amendment by a tie vote with one abstaining. The company appealed to the Board.

Before dealing with the merits of the appeal it is necessary to review the past history of the L.U.B. In February, 1988, the Town adopted a revised Municipal Planning Strategy (M.P.S.) and L.U.B. The Minister of Municipal Affairs did not approve the revised M.P.S. and L.U.B. until May 18, 1988.

On April 28, 1988, Council amended the existing L.U.B. to permit bowling alleys and other "large scale commercial recreation uses" in the Mixed Use (MUZ) Zone. In passing the amendment, Council specifically excluded "games permitted in a place of entertainment". A "place of entertainment" is defined in the L.U.B. to include video games.

One of the reasons Council excluded video games from "large scale commercial recreation uses" was a concern that these games attracted persons who would then commit vandalism in adjacent residential areas.

When the Minister approved the revised L.U.B. on May 18, 1988, the April 28, 1988 amendment was omitted. The omission was not discovered until the Appellant applied for its amendment in 1989.

In order to rectify the omission, Council on October 19, 1989, passed a motion to amend the revised L.U.B. as follows:

> "Part 18, "Mixed Use (MUZ) Zone", Section 1, is amended by adding the following to the list of permitted uses:
>
> large scale commercial recreational uses wholly contained within a building such as bowling alleys, curling rinks, skating rinks, swimming pools, tennis courts and other similar uses, but excluding games permitted in a place of entertainment. For purposes of clarity, no other commercial use except a concession stand and/or small restaurant designed to cater only to the large scale commercial recreational use shall be considered accessory to the main use."

The Appellant made a formal application to amend the L.U.B. on July 11, 1989. The stated purpose of the proposed amendment is:

> "To permit the installation of video game machines as an accessory use to a large scale commercial recreational facility".

The Cape Breton Metro Planning Commission prepared a report for Council. The recommendation reads as follows:

> "Staff clearly is not in a position to confidently suggest that the video game machines were, or were not, directly responsible for attracting the vandals into the neighbourhood. However, the complaints were only received while the video game machines were available and apparently ceased after they were removed. One of he [sic] fundamental purposes of zoning is to protect existing developments from the nuisance of potentially obnoxious developments. Until there is enough evidence to suggest that the vandalism was unrelated, staff is not prepared to recommend that Council approve this zoning amendment application."

The Planning Advisory Committee recommended against the amendment on September 12, 1989. Council held a public hearing on October 19, 1989. Council Minutes state two residents orally objected to the proposed amendment. They complained the installation of video games resulted in an increase in vandalism in the residential area. They further stated that the removal of the games resulted in a decrease in the vandalism. A petition of 28 names opposed to the video games was submitted to Council.

Although it is not referenced in Council Minutes, the Chief of Police submitted a letter to Council that stated in part:

> "It has been my experience in the past that where ever these machines are allowed to be installed causes loitering in the area plus property damage...".

Following the public hearing Council voted on a motion to reject the amendment. There was a tie vote with one abstention. Council then voted on a motion to approve the application with the same result.

At the Board's hearing, three persons spoke in opposition and a petition with 104 names of persons opposed was presented. One of the witnesses represented a Ladies Bowling League whose members use the Appellant's bowling lanes in North Sydney. They are opposed to the reintroduction of the video games. Their spokeswoman said they had been harassed by the persons using the video games and some cars had been vandalized while they were bowling.

Mr. Fudge, the North Sydney Manager of National Bowling Lanes, testified that most of those who used the video games before they were removed were from Ward 4 which includes the residential area adjacent to the bowling lanes. He quoted police figures showing that there was an increase in vandalism in the Town of North Sydney in 1989. The video games were removed in February, 1989.

Section 63(5) of the Planning Act states that the Board shall not allow an appeal unless "the decision of Council cannot reasonably be said to carry out the intent of the municipal planning strategy."

The Board has reviewed the M.P.S. It contains a section dealing with lands surrounding the Northside Industrial Park. The section reads in part as follows at page 15:

> "This Municipal Planning Strategy implements land use policies for this area that attempt to:
>
> - protect the residential neighbourhoods from the encroachment of incompatible land uses;
>
> - only permit development proposals that will complement the Industrial Park concept;
>
> - ensure a third major commercial sector is not developed to rival the Downtown;..."

It also contains a paragraph in the introduction to Part 2: Commercial, which is relevent. The paragraph is located on page 6 of the M.P.S. and is as follows:

> "Council intends to be very selective in permitting commercial development in the Northside Industrial Park and the undeveloped lands between the Park and the residential neighbourhoods to the west and south of it referred to in this Planning Strategy as the Goat Hill area. The effect on the Park itself, the residential neighbourhoods along the slope of Goat Hill, the Downtown and the King Street area could be considerable."

The Board was advised the L.U.B. permits video games in the downtown business zones and in the shopping mall. Reference was not made to the specific sections of the L.U.B. which permit video games in those areas.

The Board has reviewed the L.U.B. The term "places of entertainment" does not appear in the list of uses permitted in the downtown commercial zones. The term "entertainment facilities" does appear. This term is not defined in the L.U.B.

The definition of "places of entertainment" in the L.U.B. is as follows:

> ""Places of Entertainment" means a facility where a performance on stage or screen is the focal attraction, or a commercial facility offering games of entertainment such as video games, pool (snooker) tables or other similar games."

The Board assumes that the term "entertainment facilities" as used in the L.U.B. is meant to be the same as "places of entertainment". The Board accepts the evidence that video games exist in the downtown zones.

Places of Entertainment are specifically excluded from the Highway Commercial (CH2) Zone. The only permitted use in the Commercial Shopping Mall (CSM) Zone is shopping centres and accessory uses.

The intent of the M.P.S. is to protect the residential neighbourhoods adjacent to the Mixed Use Zone from incompatible land uses. Council has determined that video games are an incompatible land use. There was some evidence presented to Council to support that view.

Council, in refusing to delete the prohibition against video games, was reasonably carrying out the intent of the M.P.S. Under Section 63(5) of the Planning Act, the Board must, therefore, dismiss the appeal.

Section 63(7) of the Planning Act, however, permits the Board to allow an appeal if, in the Board's opinion,

> "a) the applicant would suffer undue hardship; or
>
> b) extraordinary and compelling circumstances are present."

Mr. Fudge testified that the income generated by the video games paid for the salary of one staff person. He pointed out that during the summer months people do not frequent the bowling alley. Video games provide a source of revenue to the company for these lean months. He said the other bowling alleys operated by the Appellant in Nova Scotia contain video games.

This evidence must be balanced against the evidence that Council adopted the amendment to permit bowling alleys in the Mixed Use Zone as a result of the request by National Bowling Lanes. The company should have been aware that the amendment permitting large scale commercial recreational uses prohibited video games. While the evidence is not clear, presumably the amendment of April 28, 1988 pre-dated the building of the bowling alley which opened in September, 1988.

The Board is not satisfied on the evidence presented that the Appellant would suffer undue hardship or that the extraordinary and compelling circumstances exist.

The Board dismisses the appeal and confirms the decision of Council.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 7th day of February, A.D., 1990.

LINDA D. GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

MILLER v. TOWN OF TRURO

PLANNING - L.U.B. AMENDMENT - REFUSAL TO REZONE R-2 TO R-3 TO PERMIT CONVERSION TO 4-UNIT BUILDING - TRAFFIC - NEW EVIDENCE - MUNICIPAL BOARD ACT S. 27(3), (4), PLANNING ACT, S. 63(3).

S.M. applied to amend the L.U.B. to permit conversion of a duplex to a 4-unit apartment building. Council refused on the basis of the opinion of Chief of Police as Traffic Authority. At the Board hearing, an expert in traffic filed a detailed report. The Board preferred this report.

HELD: Appeal allowed.

The Appeal procedure followed by the Board can best be described as a hybrid. It is neither a straight appeal nor is it a hearing de novo. The Board is required to hear new evidence where tendered. The Municipal Board Act permits interested persons to call evidence. Clear language would be required to restrict planning appeals. It would be extremely difficult to determine what evidence was before Council and what is new at the appeal.

The word "may" in s. 63(5) gives Council discretionary powers in permitting L.U.B. amendments, however, Council must work within the intent of the M.P.S.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S. 1983, c. 9, by **SANDY MILLER** from a decision of the Council of the **TOWN OF TRURO** made September 5, 1989, which refused to amend the Town's Land Use By-law by rezoning property located at Civic No. 41-43 Curtis Drive, Truro, from Residential Double Family (R-2) Zone to Residential Medium Density (R-3) Zone.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: PETER M. ROGERS, LL.B., on behalf of the Appellant, SANDY MILLER;

DAVID W. GRUCHY, Q.C., and STEPHEN ROBERTSON, Articled Clerk, on behalf of the Town of Truro.

HEARING DATE: December 18, 1989.

DECISION DATE: February 9, 1990.

DECISION: Appeal Allowed.

DECISION

On June 27, 1989, Sandy Miller, the Appellant, requested an amendment to the Land Use By-law (L.U.B.) for property located at 41-43 Curtis Drive, Truro, from Residential Double Family (R-2) Zone to Residential Medium Density (R-3) Zone. On July 4, 1989, Town Council voted to refer the matter to the Town Planning Advisory Committee (PAC) for study and recommendation.

Peter A. Nelson, the Director of Planning and Development for the Town, in a report dated July 28, 1989, recommended Council approve the amendment.

At a meeting on July 31, 1989, the PAC received the report from Mr. Nelson and recommended approval to Council.

On August 1, 1989, Council approved a public hearing for September 5, 1989. At the September 5th meeting Council reviewed the recommendation of the PAC as well as a letter of objection from Jim and Lois Seel. Mr. Nelson appeared and reviewed his report. Mr. Rogers appeared on behalf of Mr. Miller. The Chief of Police advised about his traffic concerns. The engineer advised about possible changes to the existing roads. Lois Seel also appeared, objecting to the proposal.

Council refused the request for L.U.B. amendment, citing Policy 501(b)(iv) of the Municipal Planning Strategy (M.P.S.) for the Town of Truro.

This decision, including the reason for refusal, was communicated to the Appellant by letter dated September 12, 1989. Mr. Miller appealed this decision by Notice of Appeal received by the Board on September 27, 1989.

The subject property is located on the east side of Curtis Drive (approximately in the middle). Curtis Drive runs south off of Glenwood Drive. Glenwood Drive is located in the southern part of the Town of Truro and runs east and west between Willow Street and Young Street. Except for two institutional lots (Church), residential lots border both sides of Curtis Drive. The subject lot is approximately 100 feet by 130 feet. It contains a large semi-detached structure and an inground swimming pool. The property is currently zoned R-2 (Double Family Residential).

The land uses on Curtis Drive, within the proximity of the subject property, are a very mixed density ranging from single family dwellings to twelve unit apartment buildings. They are broken down as follows:

"11 are in excess of 3 units
14 are single family dwellings
3 are two units
3 are unknown or vacant
2 are institutional

32 total"

This property was also the subject of a similar appeal in 1988, see Miller & Miller v. Town of Truro (1988) Volume 7-B Part I M.B.D., 591. The Board's decision at that time dismissed the appeal.

Mr. Rogers called three witnesses on behalf of the Appellant.

Peter A. Nelson is the Director of Planning and Development for the Town of Truro. He was the author of the Planner's Report dated July 28, 1989, concerning the application for rezoning. Mr. Nelson reviewed this report (Exhibit M-1, Appeal Record) which covered descriptions of the site area and its appropriateness, consideration of Policies 202(b) and 501 of the Municipal Planning Strategy (MPS), a review of comments of the Board in its previous decision, events since the last Planner's Report in May, 1988, and some traffic considerations. The Report concluded with the following:

> "Conclusion and Recommendations
>
> Upon reflection of the Planner's Report of May 31, 1988, N.S. Municipal Board Decision, and recent efforts to study and evaluate traffic, I have to agree with the board member that the development proposed would not cause problems given the relative scale proposed. That traffic issues are being addressed and if development opportunities are going to be denied on the basis of traffic issues the Town will need to be responsive to solving the Traffic Authority's problem when raised. Finally, the scale of development potential and similar uses in the area are conducive to Council approving this requested rezoning under Policy 202(b). I therefore recommend Council approve this request."

Fred C.S. Lee was accepted as qualified to give expert testimony in traffic matters. Mr. Lee is employed by Vaughan Engineering Associates Limited. He prepared a traffic report, dated December 14, 1989, on the Curtis Drive, Glenwood Drive Intersection (Exhibit M-2). Until 1989, Mr. Lee was Provincial Traffic Authority for the Province of Nova Scotia for twenty-six years and Director of Traffic Engineering for the Department of Transportation for twenty years.

Mr. Lee reviewed his report which included an introduction, various data collection information, technical descriptions and conclusions and recommendations.

The Section dealing with technical discussion included the following headings:

> "Safety Considerations
> Design Standards
> - Stopping Sight Distance
> - Turning Sight Distance
>
> Accident Record
> Speed Characteristics
> Traffic Impact

Possible Actions"

Mr. Lee explained that in examining safety conditions it is necessary to determine whether the intersection meets the minimum design standards for safety and the safety record at the intersection.

Mr. Lee went on, in some detail, to explain design standards and the methodology of calculating stopping sight distance and turning sight distance. Stopping sight distance is the distance required for the operator of a vehicle to stop if necessary. This is the key measurement adopted for the standards of the Department of Transportation. The turning sight distance calculation is a calculation of the distance needed to enable a vehicle to turn left or right from a minor street without slowing any oncoming vehicles. This is considered a desirable characteristic but is not a requirement.

Mr. Lee, at page 6, in his report states the following:

> "While the intersection fails to meet a turning sight distance requirement, it nevertheless meets the most important sight distance requirement, stopping sight distance. As long as the drivers approaching from the west on Glenwood Drive are aware of the existence of the Curtis Drive intersection and do not exceed the speed limit too much, the intersection can be operated relatively free of accidents as is the case now."

Mr. Lee next reviewed the accident record of the intersection. This record showed four accidents in the last two years from January, 1987 to January, 1989. Mr. Lee was of the opinion that three of the four accidents would not normally be attributed to intersection design. The cause of the fourth accident was unknown at the time of his report. He concludes this section by stating:

> "Therefore it can be said that this intersection has a very good accident record."

The traffic impact section of his report details the number of vehicles which use the intersection and various measurements of capacity. He concludes this section with the following comment:

> "It can be seen that the 15 trips a day generated by the three additional dwellings will not have any appreciable affect on the situation".

In the technical section Mr. Lee lists seven possible remedial actions which could be taken by the Town. They are as follows:

> "There are a number of remedial actions that can be taken, depending on the problems that will develop as traffic volume and accident frequency increase. Among the possible actions are:
>
> 1. Review speed limit enforcement activities on Glenwood Drive and increase surveillance if found to be necessary.
>
> 2. Restrict all left turns.
>
> 3. Improve signing from the west approach by replacing the existing worded warning sign with a new standard symbol sign (WA1-R) plus an advisory speed sign.
>
> 4. Install flashing amber/red lights at the intersection.
>
> 5. Install 3-way stop control at the intersection.
>
> 6. Install traffic control signals at the intersection.
>
> 7. Change (lower) the profile of Glenwood Drive so that sight distance from the west approach is improved."

Mr. Lee concluded his report on page 10 with the following statement:

> "Based on the foregoing analysis, the intersection is operating at a satisfactory level of safety. The additional traffic volume generated by the three proposed dwelling units will have no discernable impact on the operation of the intersection."

Sandy Miller testified that he and his brother would be moving, or had moved out of each side of the semi-detached home in which they lived. He wished to install new basement apartments on both sides of the building thus converting it to four units. He stated that in the future he wishes to convert the garage to residential purposes thus creating a total of three new units. He also stated that the swimming pool located in the backyard of the residence would be filled in once he moved out regardless of the outcome of the appeal.

Mr. Miller stated that the telephone pole, located at the corner of Curtis Drive and referred to in the previous Miller decision, had been removed. He also said the yield sign formerly on that pole had been replaced by a stop sign on a steel pole. He believed that these changes had made right turns off of Curtis Drive much safer.

Mr. Miller's recollection of the discussion at the Council Meeting was that traffic was the only issue openly discussed by Councillors.

A.L. Murray, Chief of Police and Traffic Authority for the Town of Truro, testified on behalf of the Town. Chief Murray lives on Curtis Drive and uses the intersection at Glenwood Drive frequently. Chief Murray reviewed his concerns about the traffic at this intersection and the speed of cars along Glenwood Drive. He stated that his recommendation to Council was based on the fact that he did not want to see any more building on Curtis Drive because of the traffic on Glenwood Drive.

The Chief stated that he had read Mr. Lee's report. While he was in agreement with the recommendations suggested by Mr. Lee, he was concerned that any addition to the traffic flow would affect the whole street and its future development. He also stated that he carried out some tests on the intersection and turning times which he felt showed that there was a problem at that corner.

Lois E. Seel, a resident of 50 Curtis Drive, read a letter to the Board expressing her concern regarding the rezoning application (Exhibit M-9). The letter's main concern was the investment of homeowners would be in jeopardy and be downgraded should the appeal succeed. Ms. Seel also expressed some concerns about the date and timing of Mr. Lee's report. She was concerned that the weather on November 30, 1989 may not have been conducive to an appropriate study.

The Board viewed the Curtis Drive site. It travelled Glenwood Drive in both directions, and made both left and right turns off of Curtis Drive onto Glenwood Drive and from Glenwood Drive onto Curtis Drive.

Mr. Nelson in his report referred to Policy 202(b) and Policy 501 of the M.P.S. These Policies read as follows:

"P-202(b) Therefore, it shall be a policy of Council to:

Consider and may permit zoning amendments for medium density uses in low density residential areas where, in the opinion of Council, substantial medium density development has occurred as a result of previous zoning and residual lands abutting and on the same street would be difficult or unlikely to develop for low density residential uses.

P-501 Therefore, it shall be a policy of Council to:

In considering amendments to the Zoning By-law, in addition to all other criteria as set out in various policies of this Plan, Council shall have regard to the following matters:

a) That the proposal is in conformance with the intents of this Plan and with the requirements of all other Town By-laws and regulations;

b) That the proposal is not premature or inappropriate by reason of:

i) the financial capability of the Town to absorb any costs relating to the development;

ii) the adequacy of sewer and water services and utilities or if services are not provided, the adequacy of physical site conditions for private on-site sewer and water systems;

iii) the adequacy and proximity of school, recreation, and any other community facilities;

iv) the adequacy of road networks in, adjacent to, or leading to the development;

v) the potential for the contamination of watercourses or the creation of erosion or sedimentation;

vi) creating a leap-frog, scattered or ribbon development pattern as opposed to compact development.

c) That controls are placed on the proposed development so as to reduce conflict with any other adjacent or nearby land use by reason of;

i) type of use;

ii) emissions including air and water

> pollutants and noise;
>
> iii) height, bulk, and lot coverage of the proposed buildings;
>
> iv) traffic generation, access to and egress from the site, and parking;
>
> v) open storage;
>
> vi) signs;
>
> vii) similar matters of planning concern.
>
> d) Suitability of the proposed site in terms of steepness of grades, soil and geological conditions, location of watercourses, marshes, swamps, or bogs and proximity of highway ramps, railway right-of-ways and other nuisance factors.
>
> e) Provision for buffering, screening and access control to reduce potential incompatibility with adjacent land uses and traffic arteries."

The Board is satisfied that these are the Policies of the M.P.S. which relate to this appeal.

In his final argument, Mr. Gruchy raised as an issue, the Board's right to consider new evidence not before Council and to overturn Council's decision on the basis of that evidence.

Various sections of the Planning Act provide that persons may appeal a decision of Council or a development officer or other person to the Board. The Planning Act does not define "appeal" and does not establish a procedure to be followed on an appeal.

The Municipal Board Act governs proceedings of the Board. Section 21 gives the Board the right to inspect books and records of a Municipality or agency and the authority to examine any officer, agent or employee. Section 24 requires that the Board hear all matters and sets the location for hearings. Section 25 provides for the advertising of hearings. Section 27(1) sets out the parties to an appeal. Subsection (3) permits any person to appear and given evidence "on any matter before the Board". Subsection (4) gives the Board power to add interested persons as parties in any Board proceeding.

The Municipal Board Act also refers to applications, appeals or other matters or proceedings before the Board. The Act does not specify the procedure to be followed in conducting a hearing. Section 23 gives the Board power to make general rules respecting practice and procedure.

The Assessment Act specifies that on an appeal the Board inquire into the matter de novo. The Municipal Boundaries and Representation Act sets out some requirements for applications before the Board including the obtaining of studies. The Planning Act is silent concerning the Board's conduct of a planning appeal.

The Municipal Board assumed jurisdiction under the Planning Act from its predecessor the Provincial Planning Appeal Board (PPAB). Much of the current Board's procedure was adopted from the PPAB. In December, 1988, the Governor-in-Council approved, by Order in Council 88-1368, new Rules of Practice and Procedure Respecting Planning Appeals which did amend a few of the procedures followed by the PPAB.

The appeal procedure in planning matters followed by the PPAB and adopted by the Board can best be described as a hybrid. It is neither a straight appeal nor is it a hearing de novo. A record of Council's proceedings is made available to the Board in advance and then the parties are permitted to lead any additional relevant evidence.

Under Section 27(3) of the Municipal Board Act any person who attends the hearing may give evidence at the hearing. This is usually permitted at the conclusion of the evidence of the parties or at an evening session held in conjunction with the appeal. Section 25 requires the Board to advertise its hearing in a local newspaper thus informing persons who may wish to attend the Board hearing.

Mr. Gruchy questions the Board's authority to hear new evidence and thereby implies the hearing should be restricted to a straight appeal format.

This argument cannot stand in the face of Section 27(3) of the Municipal Board Act which allows any person to "appear and give evidence on any matter before the Board". Section 27(4) which permits the adding of interested persons as parties indicates that these persons will be entitled to call evidence.

If it was intended that planning appeals were to be restricted then clear language would be required in either or both the Planning Act and the Municipal Board Act.

In most cases there is no transcript of the proceedings before Council. It would be extremely difficult to establish what evidence was before Council and what is new at the time of the appeal. In addition, before making a decision, neither Council nor a development officer is required to conduct a proceeding in the same manner as a formal court procedure, or even the manner of a less formal tribunal hearing such as the Board conducts.

In the Board's opinion it is required to hear new evidence where tendered on appeals under the Planning Act.

Section 63 of the Planning Act deals with refusals of a Council to amend a L.U.B. Subsection 3 requires the following of the Board:

> "The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy."

Subsection (5) further requires the Board as follows:

> "The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

Having made these determinations, Subsection (4) gives the Board the following powers:

> "The Board may
>
> a) confirm the decision of the council;
>
> b) allow the appeal by reversing the decision of the council amending or revising the land-use by-law; or
>
> c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board."

Mr. Gruchy argues that Policy 202(b) of the MPS is a discretionary policy in that it uses the words that Council "may permit zoning amendments". He argued that Council, in refusing the amendment, has exercised this discretion and therefore this decision reasonably carries out the intent of the MPS as required by Section 63(3). Therefore the Board must determine that the decision of Council must reasonably be said to carry out the intent of the MPS as charged by Section 63(5).

The Board agrees that the use of the word "may" as opposed to the word "shall" certainly gives Council discretionary powers in permitting L.U.B. amendments. The Board believes that in exercising its discretion, Council must work within the intent of the MPS giving due consideration to all the requirements and regulations contained therein.

It is obvious from the Minutes of Council that Policies 202(b) and 501(b) were considered in some detail.

The Minutes of the Meeting of September 5, 1989, state:

> "Mr. Peter Nelson reviewed his report on the proposed amendment reviewing the various policies...".

The Minutes go on to state:

> "Mr. Peter Rogers appeared before Council...noting that he felt the application met the criteria of Policy 202...".

In refusing the request to rezone, Council cited Policy 501(b)(iv) as the reason for the refusal.

All this would indicate to the Board that Council had the opportunity to consider the requirements of Policy 202(b) and the criteria outlined in Policy 501. In the final analysis, Council determined that the proposal was premature or inappropriate by reason of the adequacy of road networks in, adjacent to or leading to the development.

There is no information, additional to that available to

Council, which suggests that the proposed L.U.B. amendment does not meet the requirements of Policy 202(b) and the criteria outlined in Policy 501 with the possible exception of the adequacy of roads.

The Board believes the proposed L.U.B. amendment meets the requirements of Policies 202(b) and 501 of the MPS with the possible exception of Policy 501(b)(iv) as cited by Council.

In addressing policy 501(b)(iv) the Board notes the following from the Minutes of the Council meeting of September 5, 1989:

> "Council questioned the Chief as to whether there was a traffic concern with the Chief advising that he still had concerns about the intersection of Glenwood and Curtis Drive. Council also questioned the engineer as to possible improvements to this intersection with the engineer advising that the sight line on Glenwood would have to be changed noting that he did not recommend this be undertaken until an alternate route from Willow to Young Street is completed."

From this, and other evidence, it is obvious that Council based its refusal on these comments.

The Board has had the opportunity to review the report prepared by Mr. Lee on this Curtis Drive/Glenwood Drive intersection. The Board also heard his direct testimony on the matter. Council did not have his report nor hear his evidence.

Mr. Lee's testimony is in direct contradiction to the comments of the engineer recorded in the Minutes. Mr. Lee in his report on page 4 has the following comment relating to sight line:

> "The available stopping sight distance as determined from the survey plan is 70.7 meters. This is 7.1 meters longer than the minimum required and is therefore adequate."

Mr. Lee's report and testimony before the Board was very specific and supported by survey plans and exact measurements. Chief Murray's, while informative, was much more subjective and not supported by specific plans and measurements.

The Board also refers to Mr. Lee's comment that the proposed rezoning "will have no discernable impact on the operation of the intersection". What traffic problem may exist at that intersection is already there and the rezoning will not cause any additional problem.

The Board notes that the traffic situation at Curtis Drive, described by Mr. Lee's report of December, 1989, would not be significantly different from the traffic situation as it existed on September 5, 1989.

The Board has reviewed its previous Miller decision and notes the following from page 602:

> "On its view, the Board found it difficult to accept the traffic safety problem complained of at the Curtis Drive-Glenwood intersection. Despite this impression from the view, the evidence from both the Appellants and Respondent shows there is a problem at this intersection. Mr. Nelson's testimony also clearly shows that he wishes this problem cured before future development comes in. The Board therefore must accept the evidence of all the parties concerning traffic problems. The Board therefore finds the intersection traffic problem exists as described by the Chief of Police and by Sandy Miller. It further accepts that the Town Council has taken no steps to alleviate this problem and has none planned.
>
> Left to its view of the site, the Board would take the impression that a couple of basement apartments in the subject property would hardly be apparent to the street. Their use would exacerbate the traffic problem only slightly."

On page 13 of the same decision the Board states the following:

> "On a view of the site the Board felt that this development would apparently cause no problems in the area.
>
> It is not the opinion of the Board from a view alone that prevails. The Board must consider the whole of the evidence before it. It must then determine whether the decision of Council reasonably carries out the intent of the M.P.S.
>
> The Board finds that the Council had traffic concerns. The Board believes that, under the policies of the M.P.S., the Council considered and decided on the basis of those concerns.
>
> Therefore, the Board must find that the decision of the Council reasonably carries out the intent of the M.P.S. It cannot allow the appeal. It must dismiss the Appeal."

Under the current appeal, the Board again finds it difficult to accept the traffic safety problem complained of at the Curtis Drive - Glenwood Drive intersection. Also, the Board, is still of the view that this rezoning would apparently cause no problems in the area. Some improvements have been made at the intersection in that the telephone pole has been moved and the signage has been changed. The Appellant and Mr. Nelson no longer have the same traffic concerns. Mr. Lee has suggested further improvements.

The Board finds that it prefers Mr. Lee's opinion as to the adequacy of the road networks referred to in Section 501(b)(iv) over those expressed by the Chief of Police and the Town Engineer.

If no additional information has been presented during the appeal process the Board might well have determined that Council's decision on September 5, 1989, reasonably carried out the intent of the MPS based on the information provided by Chief Murray and the engineer. However, additional information was presented to the Board in the form of Mr. Lee's report. The Board has determined that it may consider his evidence.

The Board believes Mr. Lee's report correctly addresses the concerns of Section 501(b)(iv) of the M.P.S. concerning the adequacy of road networks, specifically at the Curtis Drive and Glenwood Drive intersection.

Section 202(b) of the L.U.B. may be considered a discretionary provision as argued by Mr. Gruchy. However, the Board cannot accept that Council was reasonably exercising this discretion when refusing this L.U.B. amendment. The Minutes of Council clearly show that Section 202(b) was before Council in its deliberations both through Mr. Nelson's report and Mr. Roger's presentation. None of the evidence before the Board would suggest that Couincil had any concern about the application meeting the criteria of Section 202(b). Council did not state this Section as a reason for refusal but confined its reasons to 501(b)(iv).

In summary, the Board is of the opinion that:

1. The proposed L.U.B. amendment meets the requirements of Policy 202(b). On Curtis Drive "substantial medium density development has occurred as a result of previous zoning and residual lands abutting on the same street would be difficult or unlikely to develop for low density residential uses".

2. The relevant criteria for amendments to the L.U.B. as

outlined in Policy 501 have been met by the proposal. Based on the evidence before the Board, all of which was not before Council, the Board is of the opinion "that the proposal is not premature or inappropriate by reason of the adequacy of road networks, in, adjacent to or leading to the development".

As required by Section 63(5) of the Planning Act, the Board cannot allow the appeal unless it determines that the decision of council cannot reasonably be said to carry out the intent of the M.P.S.

The Board has determined that Council's reason for refusal, as stated in the minutes , is not valid. There was no evidence presented to show any other support for Council's decision within the M.P.S. The Board finds no other support on its own review of the relevant sections of the M.P.S.

Therefore, the Board determines that Council's decision to refuse the L.U.B. amendment cannot reasonably be said to carry out the intent of the M.P.S.

Under the provisions of Section 63(4)(c), the Board allows the appeal and instructs the Council to amend the L.U.B. as applied for by the Appellant.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 9th day of February, A.D., 1990.

MICHAEL G. JOHNSON,
Chairman.
NOVA SCOTIA MUNICIPAL BOARD.

MULLINS v. CITY OF HALIFAX

PLANNING - L.U.B. AMENDMENT - DAYCARE CENTRES IN R-1 ZONE - PLANNING ACT, S. 63(5).

City Council amended the L.U.B. to limit the number of children permitted in daycare centres in the R-1 Zone to 16. Appellants operate a daycare in R-1 Zone and planned to increase the number of children to 25 as previously allowed. The Appellants claim that it is not financially viable to operate with less than 25 children.

HELD: Appeal dismissed.

M.P.S. permits commercial uses in residential area but intent is to limit the size and scope of the commercial uses through the L.U.B. The Board acknowledges that day care is a pressing issue which society must address. The Board's duty, however is limited to deciding in accordance with the powers granted by s. 63 of the Planning Act. Council determined that the existing limits on daycare centres in the R-1 Zone were not acceptable and reduced them. This is within Councils' mandate.

NSMB-36-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act by **LOUISE and JOHN MULLINS** from a decision of **HALIFAX CITY COUNCIL** made September 28, 1989, which amended the City's Land Use By-law respecting day care centres.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: WILLIAM COX, Q.C., LESLIE DELLAPINNA, LL.B., and JUDITH FERGUSON, Articled Clerk, on behalf of the Appellants;

BARRY ALLEN, LL.B., on behalf of the City of Halifax.

HEARING DATE: January 17, 1990.

BRIEFS SUBMITTED: January 26, 1990, by the Appellants;

January 31, 1990, by the City.

DECISION DATE: February 12, 1990.

DECISION: Appeal dismissed.

DECISION

Mr. and Mrs. Mullins, the Appellants, purchased a bungalow in Fairview in the summer of 1988. They renovated the main floor for use as a day care centre for 16 infants aged 3 1/2 months to 1 year. They planned to renovate the basement to accommodate 9 children once they had sufficient funds. Mrs. Mullins opened the day care centre in September, 1988.

Plymouth Street, which runs of Evans Avenue, is a cul de sac with 7 homes. It is zoned R-1, Single Family Dwelling Zone. When the residents learned of the proposed day care centre, some of them complained to Alderman Leiper. They objected to the house being empty on nights and weekends and to a fence in the side yard. Once the day care centre opened they complained about the increased traffic and the noise generated by the centre.

Alderman Leiper raised the issue of day care uses in the R-1 Zone at the August 25, 1988 Council meeting. The issue was raised at subsequent Council meetings. A Staff Report dated November 16, 1988, recommended that no further action be taken.

Council then requested staff to review the regulations respecting day care centres. Staff conducted surveys of day care operators and residents near day cares and held a public meeting on January 31, 1989. A Staff Report dated April 5, 1989 recommended that the Land Use By-law (L.U.B.) be amended to:

> "1) Remove the ability to have centres larger than 25 children in the R-1 zone;
>
> 2) require a separation distance of at least 200 feet between day care centres."

Council continued to review the matter.

On September 20, 1989, Council held a Public Hearing to consider the following amendments to the L.U.B.:

> "i) remove the ability to have day care centres larger than 16 children in the R-1 Zone;
>
> ii) require a separation distance of at least 500 feet between day care centres."

A number of persons spoke both for and against the proposed amendments at the Public Hearing. Council received a substantial amount of correspondence on the issue both for and against. The Planning Advisory Committee recommended approval of the proposed amendments.

On September 28, 1989, Council passed the amendments to the L.U.B. restricting day cares in the R-1 zone to 16 children and requiring a separation distance of 500 feet between day cares.

Mrs. Mullins on August 2, 1989, applied for a development permit to increase the capacity of 7 Plymouth Street to 25 children. At the time of her application, she was not advised that the permit could not be issued because the proposed amendment had been advertised. In late August or early September, City staff advised her no permit could be issued. Mr. Mullins had already commenced renovations to the basement. The renovations included installing coat hooks, bathroom fixtures and a fire door.

Mrs. Mullins operates another day care centre for 75 children a few blocks away at 15 Gordon Avenue, a 4-unit apartment building. Each apartment is run as a separate unit with a specific age range of children. Both 7 Plymouth Street and 15 Gordon Avenue are run under the name Happy Tots Preschool and Nursery. Both day care centres are licensed by the Department of Community Services.

The amendment to the L.U.B. prevents Mrs. Mullins from expanding her day care operation at 7 Plymouth Street. Her initial intention was to provide facilities for 9 additional infants. She subsequently learned that an infant day care centre may not be housed in a basement. She then decided to set up a preschool with children coming for a morning and/or afternoon session with no lunch provided.

The Mullins' appealed Council's September 28, 1989 decision. They argue the amendment effectively prohibits daycare centres in the R-1 Zone. They presented some financial evidence to the Board. The monthly budget for 7 Plymouth Street showed a $607.67 deficit. This was covered by a surplus from the Gordon Street operation. Mrs. Mullins testified she would not have bought 7 Plymouth Street if she had known only 16 children would be permitted.

The Board held an evening sitting for members of the public to make representations. A large group of people attended. Several residents of Plymouth Street testified. The Board learned that the Regional Assessment Appeal Court reduced the 1989 property assessment for owners of homes on Plymouth Street by 5% due to the presence of the day care centre.

Prior to the amendment the requirements for day care centres, which are defined as day nurseries, in the R-1 Zone in Mainland Halifax, were as follows:

> "20(1) The following uses shall be permitted in any R-1 Zone:
>
> (i) a day nursery for not more than 25

children.

23A Notwithstanding the provisions of Section 21(a) and (b), buildings erected, altered or used for a day nursery use in an R-1 zone shall comply with the following requirements:

a) lot frontage minimum - 60 feet

b) lot area minimum - 6,000 square feet.

23B Notwithstanding the provisions of Section 20, day nurseries located in buildings other than dwellings may accommodate more than 25 children.

23C Notwithstanding the provisions of Section 20(1)(j)[sic], day nurseries located in dwellings may accommodate an additional four children for each 1,000 square feet of lot area by which a lot exceeds 6,000 square feet." [NOTE: s. 20(i)(j) does not deal with day nurseries].

The relevant portions of the Municipal Planning Strategy (M.P.S.) are Sections 2.2, 2.4 and 2.7:

"2.2 The integrity of existing residential neighbourhoods shall be maintained by requiring that any new development which would differ in use or intensity of use from the present neighbourhood development pattern be related to the needs or characteristics of the neighbourhood and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate.

2.4 Because the differences between residential areas contribute to the richness of Halifax as a city, and because different neighbourhoods exhibit different characteristics through such things as their location, scale, and housing age and type, and in order to promote neighbourhood stability and to ensure different types of residential areas and a variety of choices for its citizens, the City encourages the retention of the existing residential character of predominantly stable neighbourhoods, and will seek to ensure that any change it can control will be compatible with these neighbourhoods.

> 2.7 The City should permit the redevelopment of portions of existing neighbourhoods only at a scale compatible with those neighbourhoods. The City should attempt to preclude massive redevelopment of neighbourhood housing stock and dislocations of residents by encouraging infill housing and rehabilitation. The City should prevent large and socially unjustifiable neighbourhood dislocations and should ensure change processes that are manageable and acceptable to the residents. The intent of this policy, including the manageability and acceptability of change processes, shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate."

None of these policies specifically address day care centres. The policies do permit commercial uses in residential areas. The intent is to limit the size and scope of the commercial uses through the L.U.B.

The Board was not advised upon what basis the City set the original criteria for the child capacity for day cares in the R-1 Zone. Staff, at Council's request, reviewed the figures and recommended that they be limited to 25 children per centre. Mr. Campbell, a Planner for the City, testified that while his recommendation was for 25 children, he could not say that Council's decision limiting the number to 16 was wrong or contrary to the intent of the M.P.S.

The May 11, 1989 Staff Report states there are 5 day care centres located in the R-1 Zone. Two of the five (including 7 Plymouth Street) had less than 25 children and the three remaining had 30 or more.

The November 16, 1988 Staff Report states there are a total of 67 day care centres in the City with an average capacity of 37 children. [It is not clear whether this total includes part-time nursery schools and preschools which by definition are day nurseries under the L.U.B. but which are not usually considered day care centres by their operators and users.]

In the Appellants' brief, Counsel argued that day care operators are performing a vital service and should be encouraged. Counsel argued that Society should make the interests of the children a greater priority than the interests of the residents who live close to day care centres.

The Board acknowledges that day care is a pressing issue which Society must address. The Board's duty, however, is limited to deciding the appeal in accordance with powers granted by Section 63 of the Planning Act which states in part as follows:

> "63(5) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

The M.P.S. does not place a greater priority on the rights of children. The M.P.S. does require Council "to ensure that any change it can control will be compatible" with residential neighbourhoods. Council is also required to "ensure change processes that are manageable and acceptable to the residents."

Permitting commercial uses in residential neighbourhoods requires limits. Council determined that the existing limits on day care centres in the R-1 zone were not acceptable and reduced them. This is within Council's mandate.

The Appellants argue a day care centre will not be financially viable with less than 25 children. The evidence presented does not satisfy the Board that this is the case.

The Appellants also argue that the amendment was directed at restricting their day care centre at 7 Plymouth Street. While, as noted by Counsel for the City, 7 Plymouth Street was the catalyst for Council's review of day care centres in the R-1 Zone, Council did not make its decision for that reason alone. Representatives from other areas of the City made presentations at the Public Hearing. Council in addition received various Staff Reports which discussed all the day care centres in the R-1 Zone.

The Board determines the decision of Council can reasonably be said to carry out the intent of the M.P.S.

The Board dismisses the appeal and confirms the decision of Council.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 12th day of February, A.D., 1990.

LINDA D. GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

CULLIP v. TOWN OF TRURO

PLANNING - DEVELOPMENT PERMIT - REFUSAL TO PERMIT A 111M^2 GARAGE - ACCESSORY USES - BUILDINGS & STRUCTURES - TOWN OF TRURO L.U.B. S. 4.23

The Appellant is building a large home and sought to add a 3 bay, 1200 square foot (111m^2) garage. According to the Development Officer, the L.U.B. restricted accessory uses, buildings and structures to 70 square metres. The Appellant argued the L.U.B. excluded attached buildings from the size limitation.

HELD: Appeal dismissed.

The Board cannot examine sections of a L.U.B. in isolation but must determine its overall intent. The definition section is an integral and equal part of a L.U.B. It is clearly the intent to restrict accessory uses, buildings and structures to a maximum of 70m^2 in total floor area.

The Board sympathizes with the Appellant's position but Council is the appropriate body to deal with the concerns.

NSMB-40-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S. 1983, c. 9, by GARY CULLIP from a decision of PETER NELSON, DEVELOPMENT OFFICER for the TOWN OF TRURO, made October 31, 1989, which refused a request for a development permit to alter a single family dwelling by including a three-car garage as part of the structure.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: GARY CULLIP, Appellant, on his own behalf;

DAVID W. GRUCHY, Q.C., and JEFF BLANCHARD, Articled Clerk, on behalf of the Development Officer for the Town of Truro.

HEARING DATE: January 23, 1990;

DECISION DATE: February 21, 1990.

DECISION: Appeal dismissed.

DECISION

In the fall of 1989, the Appellant decided to construct a single family residential dwelling on a lot of land located at 176 Purdy Drive in the Town of Truro. The area is zoned R-2 (Residential Two Family).

The subject property is located on the west side of Purdy

Drive, the second house from the end. Purdy Drive runs south off of Glenwood Drive. Glenwood Drive is located in the southern part of the Town of Truro and runs east and west between Willow Street and Young Street.

As an integral part of the plans for this residence, the Appellant intended to construct a three-bay garage. The footings for this garage would be part of the foundation for the house. The garage structure itself would be attached to the house forming part of the design. Plans for the garage called for it to be approximately 40 feet by 30 feet or 1200 square feet (111 m^2).

There were three separate applications for a development permit to construct the subject house and garage. The first application, made by the Appellant's father, Ronald Cullip, was refused on the basis that the square footage of the proposed garage exceed the maximum allowed by the Land Use By-law (L.U.B.).

The second application made by the Appellant was approved mainly because the square footage of the garage was reduced by converting part of it into a recreation room.

On October 26, 1989, Ronald Cullip made a third application to alter the development permit to restore the garage to its original proposed size. This application was refused by Peter Nelson, Development Officer for the Town of Truro and is the subject of this appeal.

In his letter of refusal dated October 31, 1989, Peter Nelson cited the following three reasons for refusing to alter the development permit:

> "1. that according to Section 4.23(f) of the Land Use By-law the proposed use would result in an accessory use which exceeds the area of 70 square meters of accessory use permitted;
>
> 2. that the structure would have at least 40 per cent of the "Building Area" as accessory use and would as a result not be incidental and subordinate to the principle use as defined in "accessory use" and/or "subordinate building" as defined in "accessory building" of the Land Use By-law; and
>
> 3. that the principle use is as permitted by zone and in this case is a single family dwelling and that permitted accessory uses must comply with the Land Use By-law, whether aggregate or whole."

By Notice received by the Board on November 14, 1989, Mr. Cullip appealed this decision of the Development Officer to the Board.

At the commencement of the hearing, the Board referred to the wording of Section 78(1) of the Planning Act, which Section states "the refusal by a municipal development officer to issue a Municipal Development Permit may be appealed by the Applicant thereof".

Ronald Cullip signed the application for the development permit. Gary Cullip is the owner of the subject property and the Appellant.

The Board finds that Ronald Cullip was acting on behalf of, and agent for, his son, Gary Cullip when applying for the October 26, 1989 development permit. Ronald Cullip was in attendance during the hearing and confirmed the relationship with the Appellant and his involvement with the development permit applications. Therefore the Board finds that Gary Cullip is a proper Appellant.

The disagreement which gives rise to this appeal is centered around the interpretation of Subsection 4.23 of the L.U.B. and the related definitions. This Subsection is located in the general provisions for all zone section of the L.U.B. and states the following under the heading "Accessory Buildings":

> "Accessory uses, buildings and structures may be permitted in any zone but shall not:
>
> a) be used for human habitation except where a dwelling is a permitted accessory use;
>
> b) be located within the front yard of a lot;
>
> c) be built closer to the front lot line or side lot line than the minimum distance required by this By-law for the main building on the lot; where an accessory building is built on a corner lot it shall be located in the rear yard or in the side yard which is not adjacent to the flanking street;
>
> d) be built closer to a street than the main building is to that street,
>
> e) except for non-residential accessory buildings in a Rural Residential (R-6) Zone or accessory buildings in an Industrial (M-1) Zone exceed 4.5 metres in height;
>
> f) except in a rural Residential (R-6) Zone or Industrial (M-1) Zone exceed $70M^2$ in total floor area;
>
> g) be built within 2 metres of the main building;
>
> h) be considered an accessory building if attached to the main building in any way; or
>
> i) be considered an accessory structure if located completely underground."

The following definitions from Section 1 of the L.U.B. assist in interpreting Section 4.23:

> "Accessory Building - means a subordinate building, whether attached or detached, not used for human

> habitation, located on the same lot with the main building, and includes a private garage or carport.
>
> Accessory Use - means a use, customary, incidental and subordinate to the principal use or building and located on the same lot with such principal use or building.
>
> Attached Building - means a building otherwise complete in itself which depends for structural support, or complete enclosure, upon a party wall shared in common with an adjacent building.
>
> Structure - means anything that is constructed or erected, the use of which requires location on the ground, or attached to something having location on the ground."

Gary Cullip argued that by virtue of 4.23(h) his proposed garage would be excluded from the restriction of 70 m^2 required by 4.23(f). He stated that although his proposed garage did meet the definition of "accessory building", it was also fully within the meaning of the definition of "attached building". He argued that the garage would be considered to be attached to the main building. Therefore, by virtue of paragraph (h), it could not be considered an accessory building. Thus it would not be subject to the square metre restrictions of paragraph (f).

He stated that the various paragraphs of Subsection 4.23 were specific clauses of the L.U.B. As such he believed that the requirements included therein would override any possible ambiguities or conflicts contained within the definition section of the L.U.B.

As such, he believed that paragraph 4.23(h) is the overriding provision. Therefore his proposed garage construction should not be considered an accessory building. A permit should be issued to permit its construction at its proposed 1200 sq. ft. (111 m^2) and not be subject to the 70 m^2 restriction.

Peter Nelson, in his capacity as Development Officer for the Town of Truro, had a different interpretation of these requirements.

He stated that he has always interpreted the 70 m^2 restriction to mean a sum total of all accessory uses, buildings and structures. Together they must not exceed 70 m^2 whether they are attached or detached garages, sheds or whatever.

In reference to this 70 m^2 restriction he stated:

> "in fact if it wasn't to be a number to be used then a 20-bay garage would be acceptable with a bachelor apartment and would be a single family dwelling in Truro and I doubt that is the objective".

He went on to say that the size of the garage in relation to the rest of the house would make it approximately 40% of the structure. He believed that if you were to discount Subsection 4.23(f) then the Applicant could put up an additional 70 m^2 detached building on the same lot. This would increase the space occupied by accessory use to close to 60% and thereby, by definition, it would fail to be an accessory use.

He further stated:

> "the second consideration with respect to Section (h) of 4.23, the distinction there is similar to the non-conforming use provisions of the Act. This refers particularly to the structure or building itself inasmuch as the accessory building or detached accessory buildings accord a different setback requirement than attached structures so some distinction between the two building structures has been made not so much what they were used for".

He explained in more detail the various setback requirements provided by the L.U.B. The property is located in an R-2 Zone and Section 8.4(a) defines the setback requirement for this particular development. This section requires a two-metre setback for an attached garage. In the case of a detached structure the setback requirement would only be one metre because of the different considerations for fire protection purposes.

Mr. Nelson continued his explanation stating that:

> "in order for the development officer to make that kind of distinction, clause (h) is necessary to allow for that distinction in setback requirements with respect to a garage structure. My interpretation of this Section is purely that distinction may be made by the Development Officer considering site plans and structures on the site where the clause (f) pertains specifically to the use and involvement in the accessory uses that may be on any particular site at a given time."

Later in his testimony, Mr. Nelson had the following to say in connection with the definition section of the L.U.B.:

> "I think the definition sections are important in guiding the development officer in terms of what the intent here is. If there is any ability to confuse in 4.23 then the definition section should help to mitigate that and I think that evaluation of comparison of percentages of floor area, the forty now and the potential of sixty if another interpretation was made is one that defeats the intent of the definition."

At the conclusion of the hearing, the Board visited the site. The exterior structure for the residential portion of the house was already constructed. The footings for the garage or garage and recreation room were poured but there was no construction taking place on top of it.

The Board has some sympathy with the arguments presented by the Appellant Gary Cullip concerning the apparent contradictions in the L.U.B. The Board believes that the proposed development meets both the definitions for accessory building and attached building. The Board also feels if subsection 4.23(h) were read in isolation it indicates that, as the proposed garage is attached to the main residential building, it may not normally be considered an accessory building. At the very least, there is an ambiguity between this paragraph (h) and the related definitions for accessory and attached buildings, when they are read in isolation.

Mr. Nelson in his testimony pointed out he felt it was necessary for him to look at the intent of the legislation when allowing or refusing development permits. The Board has no less a responsibility. The Board cannot examine policies of a L.U.B. in isolation.

Section 78(3) of the Planning Act states the following:

> "The Board Shall
>
> a) confirm the decision of the municipal development officer; or
>
> b) allow the appeal by ordering that the permit be granted, but no permit shall be granted that is inconsistent with the land-use by-law, an agreement entered into pursuant to Section 55 or 56, or a provincial land-use regulation."

In order for the Board to determine whether a proposed permit is inconsistent with the L.U.B., the Board must look at the overall intent of the L.U.B. Where inconsistencies occur in an L.U.B. the Board has an obligation to determine the intent. In addition, the Board believes that the definition Section of an

L.U.B. is an integral and equal part of any L.U.B.

In the Board's opinion it is clearly the intent of the L.U.B. to restrict accessory uses, buildings and structures to a maximum of 70 m^2 in total floor area. To interpret otherwise would be to permit a hybrid of various constructions to occur within the Town of Truro. This is not the intent of the L.U.B. In the Board's opinion, to allow such a situation would be inconsistent with the intent of the L.U.B.

Therefore, the Board must look at what is the intent of paragraph 4.23(h). For assistance it referred to Mr. Nelson's explanation concerning setbacks. In this review, the Board noted Section 4.24 of the L.U.B. which deals with setback exception for accessory building and states as follows:

> "Notwithstanding section 4.23 clauses "c" and "d" the following yard exceptions apply:
>
> i) common semi-detached garages or carports may be centered on the mutual side lot line and,
>
> ii) accessory buildings with no windows or perforations on the side of the building which faces the said lot line, may be located a minimum of 1 metre from the said lot line in any residential zone, except a Rural Residential (R-6) Zone;"

In reading 4.24(ii) the Board recognizes the relationship referred to by Mr. Nelson in his testimony.

The proposed garage has no windows or perforations on the side of the building which faces the lot line. As such, subsection 4.24(ii) would permit that accessory building to be located a minimum of one meter from the line. However when considering the proposal in light of Subsection 4.23(h) then the proposed garage would not be considered an accessory building and would be subject to the 2-metre requirements located elsewhere in the L.U.B. Mr. Nelson explained that this additional distance was necessary because of additional fire concerns for attached buildings.

The Board believes that if Mr. Cullip's interpretation were accepted, additional accessory uses, buildings and structures could be located on the subject property. The Board is of the opinion that this interpretation would also be inconsistent with and contrary to the intent of the L.U.B. This is specifically in reference to the restriction "of 70 m^2 in total floor area" contained in 4.23(f). In forming this opinion the Board accepts the importance of the word "total" as contained in this paragraph and its meaning to include a sum of the floor area of all accessory uses, buildings and structures located on a property.

The Board favours Mr. Nelson's interpretation as being consistent with the intent of the L.U.B.

The Board has looked further at the wording of Subsection 4.23 and notes that the opening sentence includes accessory uses, buildings and structures and does not confine itself strictly to accessory buildings. The proposed use of the space in question as a garage would also meet the definitions provided in Section 1 of "accessory use" and "structure". As such the garage would still be restricted to 70 ^{2}.

It also could be argued that all three words, "use", "building" and "structures" should be included in paragraph (h) if this paragraph was intended to be restrictive as to the requirements of paragraph (f) or any other paragraph in Subsection 4.23. This argument would further enhance Mr. Nelson's interpretation of Subsection 4.23.

In summary, the Board finds that the decision to refuse the development permit is not inconsistent with the L.U.B.

From its own view of the site, the Board does not find that the proposed garage is offensive to the total planned structure, or the lot on which it is situated or the neighbourhood in which it is located.

Mr. Nelson, in his remarks to the Board, said:

> "While I may have sympathy for the particular structure involved here and say that there probably should be some measurable proportion, it is not something a development officer can change in his role. It is something that probably could be considered by Council if they felt that there should be some change to the standards and I speak I guess with my other hat now not as a development officer but as a planner. That would seem to me to be an appropriate role..."

The Board agrees with Mr. Nelson that Council is the appropriate body with which to deal with the concerns raised by this Appeal. The Board also shares Mr. Nelson's position that the concerns regarding the reasonableness of the 70 m^2 restriction is not something that the Board can change.

The Appellant is free to apply to Council to amend the L.U.B. to remove or adjust the 70 m^2 restriction or provide some other measurable proportion.

As required by Section 78(3) of the Planning Act the Board hereby dismisses the appeal and confirms the decision of the

Municipal Development Officer.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 21st day of February, A.D., 1990.

MICHAEL G. JOHNSON,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

JOHN ROSS & SONS LTD. v. TOWN OF TRURO

PLANNING - DEVELOPMENT PERMIT - REFUSAL BY DEVELOPMENT OFFICER - NON-CONFORMING USE - FIRE DAMAGE - PLANNING ACT (1983) s. 83, 86; PLANNING ACT (1969) s. 47(3).

The Appellant owned a site on Cummane Street zoned in 1983 to R-3. The site contained the concrete slab left after a fire which burned down a non-conforming warehouse in 1979. Since the fire, the Appellant used the site for various types of outdoor storage. In 1989, the Appellant applied to the Development Officer for a development permit to rebuild the warehouse as a non-conforming use damaged by fire under Section 86 of the 1983 Planning Act. Development Officer refused the permit. The Applicant Appellant appealed to the Board.

HELD: Appeal Dismissed. Decision of Development Officer confirmed.

Section 86 is not intended to apply to structures destroyed or damaged by fire prior to the enactment of the 1983 Planning Act.

The market value of the cement slab exceeded 25% of the market value of the original building.

The uses since the time of the fire had changed. Outdoor storage is not the same use as a warehouse use. A person cannot change one non-conforming use to another non-conforming use in order to retain the statutory benefits of Section 86. The non-conforming warehouse use had been discontinued for more than six months since the fire.

The Board noted that under the 1969 Planning Act in force at the time of the fire, the Appellant would not have been able to rebuild his warehouse as a non-conforming use.

NSMB-33-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act by JOHN ROSS & SONS LTD. from a decision of PETER NELSON, DEVELOPMENT OFFICER for the TOWN OF TRURO made September 6, 1989, which refused the Appellant's application for a Development Permit to construct a warehouse storage building at 5 - 7 Cummane Street, Truro.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: DOUGLAS CALDWELL, Q.C., and PETER ROGERS, LL.B., for the Appellant;

DAVID GRUCHY, Q.C., and STEPHEN ROBERTSON, Articled Clerk, for the Development Officer for the Town of Truro.

HEARING DATES: December 13th and 15th, 1989, January 12, 1990.

BRIEFS SUBMITTED: February 1, 1990 for the Appellant
February 12, 1990 for the Development Officer.
February 19, 1990 for the Appellant

DECISION DATE: February 22, 1990.

DECISION: Appeal dismissed.

DECISION

John Ross & Sons Co. Ltd., the Appellant, has operated its business on Cummane Street in Truro for many years. In 1975 the company built a new warehouse at 5 - 7 Cummane Street. Four years later, in 1979, the warehouse burned. All that remains of the warehouse is the cement slab, the underground plumbing and the kneewall.

In September, 1989, the Appellant applied for a municipal development permit to build a warehouse on the existing foundation. Peter Nelson, Development Officer for the Town of Truro, refused the application because the proposed use is not a permitted use in the zone.

The Company immediately appealed the refusal. The basis of the appeal is Section 86 of the Planning Act, S.N.S. 1983, c. 9 which states:

> "DESTRUCTION OR DAMAGE
>
> 86(1) If a non-conforming structure or a structure containing a non-conforming use is destroyed or damaged by fire or otherwise
>
> > a) to an extent of less then seventy-five per cent of the market value of the structure, it may be rebuilt, repaired or re-occupied if the structure is substantially the same as it was before the destruction or damage and it is used for the same non-conforming use; or
> >
> > b) to an extent of seventy-five per cent or more of the market value of the structure, it shall not be rebuilt, repaired or re-occupied except in conformity with the requirements of the land-use by-law applicable to the property.
>
> DISCONTINUANCE
>
> (2) A non-conforming use of land or a structure shall not be recommenced if it has been discontinued for a continuous period of six months, and in such event the land or structure shall not thereafter be used except in conformity with the requirements of the land-use by-law applicable to the property."

It is necessary to review the history of zoning on the subject property and the use made of the subject property.

The Town of Truro Zoning By-law No. 17A was in effect from July 1959 until the summer of 1976. Under that By-law the subject property was zoned C(Commercial).

The company used its new building as a warehouse for various items including yarn. The company employed 6 persons to sort and package the yarn. It also conducted retail sales in the building. From time to time trucks loaded with beer were parked in the building.

Both a retail store and a warehouse were permitted uses in the C Zone under Zoning By-law No. 17A.

In 1976 Council passed and the Minister of Municipal Affairs approved a new Town of Truro Zoning By-law. The subject property was zoned Commercial General (C-1) Zone. The Zone permits a retail store use but not a warehouse use. Under the then existing Planning Act, S.N.S. 1969, c. 16, the warehouse use became a non-conforming use once the by-law was amended.

Following the fire in 1979 the Appellant applied for and received a permit to construct a retail store on the existing foundation. [For unknown reasons, the company did not act upon this permit.]

Under the 1969 Planning Act the Appellant could not have rebuilt the warehouse as a non-conforming use since more than 50% of the value of the building above the foundation was destroyed by fire. Section 47(3) of the 1969 Planning Act states:

> "If in the opinion of the council a building that does not conform to the provisions of a zoning by-law is destroyed by a fire or otherwise or is damaged by fire or otherwise to an extent of fifty per cent or more of the value of the building above its foundation it shall not be rebuilt or repaired except in conformity with the provisions of the by-law."

Following the fire, retail sales and the sorting and packaging of yarn were moved to different locations. The Appellant used the cement slab for outdoor storage of various items and for parking trucks and/or trailers.

The 1976 Zoning By-law appears to treat warehousing and outdoor storage as separate uses. They are not defined but are listed separately in the Industrial General (M-1) Zone.

The Town of Truro Land Use By-law (L.U.B.) came into effect in 1983. The subject property was again rezoned, this time to Residential Medium Density Zone (R-3). This zone does not permit retail store, warehouse or outdoor storage uses. The L.U.B. defines "warehouse" as "a building where wares or goods are stored but does not include a retail store". Outdoor storage is not defined but is treated as a different use than a warehouse.

In August 1984, the new Planning Act, S.N.S. 1983, c. 9 came into effect. The Appellant relies on Section 86 of this new Act.

Section 86 deals with the rebuilding of a non-conforming structure destroyed or damaged by fire. Section 83 sets out the requirements for deeming a structure to be non-conforming. The original structure was destroyed in 1979. The only remaining structure was the cement slab. The damage or destruction occurred before the new Planning Act came into effect.

In the Board's opinion, Section 86 is not intended to apply to structures destroyed or damaged prior to the enactment of the 1983 Planning Act. The Appellant, therefore, may not rely on Section 86 to rebuilt a warehouse which was destroyed in 1979.

In the event that the Board is wrong in its interpretation of Section 86, a review of the evidence to determine the market value of the remaining structure is necessary. Section 86 permits rebuilding only if the damage is less than 75% of the market value of the original structure.

Three witnesses gave opinion evidence of the value of the remaining structure, Ellis Ross and Richard Escott for the Appellant and Michael Topley for the Respondent.

Ellis Ross is an engineer and did the original design work for the building. He prepared the plans for the proposed new structure. Mr. Ross is related to the owner of the company. He based his figures on the original contract documents.

Richard Escott is a qualified appraiser. He reviewed Mr. Ross's calculations. He included certain items in the cost of the original building which Mr. Ross had deleted. Mr. Escott, using the Marshall Swift Computerized Cost Service, brought the value of the 1975 building up to its 1979 market value prior to the fire. In calculating the value after the fire he relied on the values used by Mr. Ross.

Mr. Escott also prepared a Cost Estimate of the buildings for 1975 and for 1979 which was introduced during cross-examination.

Michael Topley is a Civil Engineer working mainly as a Consultant in municipal services. He reviewed Mr. Ross's calculations. Mr. Topley differed on the items which he would include in costing a building. He also disputed some of the values after the fire.

Mr. Escott and Mr. Topley agreed the original value of the structure (including the foundation) is $75,047.63 rounded to $75,048.00.

The following chart sets out the various figures used by each of the witnesses in calculating the percentage value of the structure after the fire.

VALUE OF STRUCTURE AFTER FIRE

ITEM	ROSS	ESCOTT	TOPLEY
Water & Sewer	$ 400.00	$ 400.00	$ 400.00
Excavation	1,804.50	1,804.50	1,804.50
Concrete	10,937.60	10,937.60	(90%) 9,843.84
Steel Wire Mesh	4,500.00	4,500.00	4,500.00
Concrete Ramp	(100.00)	(100.00)	(100.00)
Plumbing	1,450.75	1,450.75	1,040.00
Engineering	---	1,083.00	---
Gen. Expenses	---	---	525.00
Site Cleanup	---	---	(1,000.00)
TOTAL	$18,993.00	$20,076.00	$17,013.34
1975 Value	67,183.38	75,048.00	75,047.63
% of 1975 value	28%	26.8%	22.7%

Mr. Escott accepted Mr. Ross's figures and added the architectural or engineering fees.

Mr. Topley disputed the value of the concrete and the underground plumbing. Mr. Topley added in a prorated amount for general expenses and deleted $1,000.00 for site cleanup.

The Board feels the $1,000.00 deletion for site clean-up after the fire is not a proper consideration in determining market value for purposes of section 86 of the Planning Act.

Mr. Ross's evidence respecting the value of the underground plumbing was based on his estimate that half of the plumbing cost was for the suspended heating system and the value of the fixtures destroyed by fire was $1,100.00. He estimated the value of the underground plumbing at $1,450.75.

Mr. Topley instead calculated the number of feet of underground plumbing at $20.00 per foot arriving at a value of $1,040.00. The Board accepts Mr. Topley's figure.

Neither Mr. Topley nor Mr. Escott examined the concrete slab before or after the fire in 1979. They were not able to examine it at the time of the Board hearing since it was covered with snow.

The evidence is that water soaked yarn covering the floor prevented the fire from damaging the concrete floor. Thus there was "very little" or "minimal" damage to the concrete slab. There has, of course, been some deterioration of the exposed cement slab in the 10 years since the fire.

The 10% reduction used by Mr. Topley is too high, given the evidence. The Board believes a 5% reduction is more appropriate in this case, thereby reducing the value of the concrete to $10,390.72.

In Mr. Topley's opinion the engineering or architectural fees should be excluded because it is necessary to inspect the remaining structure before rebuilding. Mr. Ross excluded these costs. Mr. Escott added them. In the Board's opinion there is some merit in Mr. Topley's argument.

The Board has done a number of calculations using higher and lower percentages of engineering costs and percentage of damage to the cement. The calculations arrive at a ratio of the market value of the remaining structure to the market value of the whole building ranging from 24.7 to 25.4%.

The model cost estimates in the Marshall Swift Computerized Cost Service as calculated by Mr. Escott showed the ratio of the remaining structure to be 22.3%. When he used his actual figures the ratio was 26.8%.

Mr. Escott testified that he attempted to obtain the assessment records for the property. He was advised by the assessment office that the records for the dates in question were not available. Mr. Escott did not inquire whether the company had its own copies of the various assessment notices. In the Board's opinion, a comparison of the assessed value of the property before and after the fire could have been useful in showing the relative change, if any, in assessment values as the use of the property changed.

The Board is satisfied that the estimate of the percentage of market value of Mr. Ross is too high and Mr. Topley's is too low. In the Board's opinion, the percentage is somewhere between 24.7 and 25.4% This range is very narrow. For purposes of this appeal, the Board finds that the percentage of the market value of the remaining structure exceeds 25% of the market value of the total structure.

Having determined that the market value of the remaining structure exceeds 25% the Board must consider subsection (2) of Section 86 which prohibits recommencing a non-conforming use or structure if it has been discontinued for a continuous period of six months. The Appellant argues it has continued to use the subject property in the same manner as before the fire. Goods were stored in the building and some of the same goods are now stored on the cement slab.

Mr. Keddy, a former manager with the company, described the activities which occurred in the warehouse. Six women were employed sorting yarn, both for retail sale and for packaging for shipment to the K-Mart Stores. Items used for well drilling were stored and available for retail sale. Various scrap metals were stored from time to time. Beer bottles were stored. One truck trailer could be parked inside. The truck was often used to haul beer and it had to be kept warm. Steel siding and bales of paper were stored in the warehouse.

After the fire the yarn sorting and packaging and retail sale of yarn did not continue on the site. The items used for well-drilling were not kept on the site. Mr. Keddy said that metals and small articles could not be stored on the site. The company no longer hauls beer. Steel siding, pallets of beer bottles and bales of paper have been stored on the cement slab. More than one truck and/or trailer have been parked on the slab.

Retail sales was a permitted use under the by-law in force at the time of the fire. The other uses were not. Those uses included the sorting and packaging of yarns which employed 6 people. The Board finds that the sorting and packaging of yarn was the major activity in the warehouse prior to the fire. That activity has been discontinued for a continuous period greater than 6 months since the fire. Retail sales have also been discontinued.

The only activities which have continued are the storage of certain items and the parking of vehicles. Under the L.U.B. outdoor storage and parking lots are different uses than a warehouse use.

The Appellant argues that the Board should find that the same non-conforming use has continued on the property. Under the Planning Act, a person cannot change a non-conforming use to another non-conforming use.

Section 86(2) permits up to a six months period of discontinuance of a non-conforming use before recommencing a structure. The Section is not intended to permit the property to be used continuously for a different non-conforming use preserving the owner's right to rebuild the property at some time in the future.

The Appellant cited a number of decisions dealing with the expansion of a non-conforming use. These decisions are of little assistance in this case. In R. v. Barry Humphrey Enterprises Ltd. (1977), 2 M.P.L.R. 54 (Ont. Div. Court) the issue was whether an existing non-conforming use could be extended over the entire vacant parcel of land. In Thorman v. City of Cambridge (1977), 4 M.P.L.R. 220 (Ont. S.C.), the issue was whether or not an existing non-conforming use could be extended to the whole of the building, a portion of which had been used for a different non-conforming use. Neither case deals with the situation where an existing non-conforming use [warehousing] has ceased to exist because of a fire and another use has taken its place.

In Weir v. Town of Collingwood (1979) 10 M.P.L.R. 133 (Ont. S.C.), the application for mandamus was denied because of the actions of the applicant. The Court did find that he had continued to use the premises for the same purpose and would be entitled to rearrange the uses of individual parts.

The difficulty in this case, is that the Appellant has not continued to use the subject property for the same use. The fact that the company was prevented from carrying on its business as a warehouse because of the fire cannot affect the Board's findings. Under the L.U.B. a warehouse use is not the same use as outdoor storage or parking lot.

The Board finds the warehouse use has been discontinued for a continuous period in excess of six months since the fire. The Board finds that the outdoor storage of certain goods and the parking of vehicles is not the same use as a warehouse use.

The Board finds that the Appellant does not meet the requirements of subsection (2) of section 86. The Board has found earlier in the decision that section 86 is not intended to apply to structures destroyed or damaged prior to the enactment of the 1983 Planning Act. The Board further notes that at the time of the fire, the 1969 Planning Act, in effect at that time, prevented the rebuilding of the non-conforming use.

The Board dismisses the appeal and confirms the decision of Peter Nelson, Development Officer for the Town of Truro.

DATED at HALIFAX, Nova Scotia, this 22nd day of February, A.D., 1990.

LINDA D. GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

MacNEIL v. SYDNEY (CITY)

PLANNING - DEVELOPMENT AGREEMENT - REFUSAL TO PERMIT BASEMENT APARTMENT IN TWO UNIT BUILDING. PLANNING ACT, R.S.N.S. 1989, c. 346, s. 79(2), CITY OF SYDNEY, M.P.S. POLICY 27(a).

The Applicant sought two development agreements to permit adding a basement unit to each of two two-unit buildings. The residents in the area of each building were opposed. Council refused the application.

HELD: Appeal dismissed.

The M.P.S. required that an accurate and recent site plan certified by a surveyor showing the accurate location of all buildings etc. be filed with the application for a development agreement. The Board found that this had not been compiled with and that it was mandatory.

NSMB-39-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S. 1983, c. 9, as amended (now known as c. 346, Revised Statutes of Nova Scotia, 1989) by JIM MacNEIL, from decisions of the Council of the CITY OF SYDNEY, made October 19, 1989, refusing to enter into a development agreement with the Appellant concerning a property at 316 Columbia Street, Sydney, and a property at 225 Whitney Avenue, Sydney, to allow construction of a third unit basement apartment in each building.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: DOMINIC GODUTO, LL.B., on behalf of the Appellant;

ROBIN CAMPBELL, LL.B., on behalf of the City of Sydney;

H.F. MacINTYRE, LL.B., on behalf of several interested parties;

HEARING DATES: February 5, 1990;
April 2, 1990;

SITE INSPECTION: April 2, 1990.

DECISION DATE: April 24, 1990.

DECISION: Appeals dismissed.

DECISION

This is a consolidated appeal under the Planning Act, S.N.S. 1983, c. 9 [now R.S.N.S. 1989, c. 346].

Some of the argument in this case has been made under Planning Act cited as R.S.N.S., 1989 c. 346. In this decision the Board will use, initially, the section citation from the former statute followed by the appropriate citation from the 1989 Revised Statutes if it differs. The Board will use the phrase ("now known as").

The Applicant applied to the City of Sydney for a development agreement for each of two lots. One is 225 Whitney Avenue, Sydney, Nova Scotia. The other is 316 Columbia Avenue, Sydney, Nova Scotia. He made the separate applications about the same time. The two lots are separated by several blocks. The lands have a common ownership. There are some differences in each property. For the purposes of this appeal there are many similarities. The Board has heard the appeal concerning both properties together. Where required the witnesses have distinguished between the lots. Where required, counsel have made distinctions between the lots in their arguments. This consolidated appeal was a convenience to the Board and to the parties concerned.

In each case, the application to enter into a development agreement was to expand an existing two-unit building by adding a basement apartment. The finished product proposed in each case was a three-unit residential dwelling. Both lots are in the Low Density Residential (LDR) designation in the City of Sydney's Municipal Planning Strategy (M.P.S.) passed and approved in 1988.

The Council considered the Appellant Jim MacNeil's applications. On October 19, 1989, Council rejected both of them after the appropriate public hearing. The Appellant appealed Council's refusal decisions to the Board.

Each lot in question is located on a developed residential street. Each lot on the street is occupied by a building of some nature or kind. The majority of buildings on the streets are two-storey single family residential dwellings.

The Appellant's Notices of Appeal were both dated November 3, 1989 and arrived at the Board in time. Undertakings to pay the cost of advertising accompanied each Notice of Appeal. Under Section 16(1) of the Municipal Board Act, S.N.S. 1981, c. 9 (now known as the Municipal Board Act, R.S.N.S. 1989, c. 297), the Chairman assigned Board Member Richard L. Weldon to hear the appeals.

The Board commenced the hearing on the date originally set, February 5, 1990. This sitting occurred at the Council Chambers of the City of Sydney, 320 Esplanade, Sydney, Nova Scotia.

Mr. Goduto and Mr. Campbell, the only counsel then present, informed the Board that Mr. H.F. MacIntyre wished to represent certain "Interested Parties" at the hearing. Counsel present said Mr. MacIntyre could not attend the February 2nd hearing. Then counsel present, at Mr. MacIntyre's request, moved an adjournment to accommodate Mr. MacIntyre's schedule. The Board adjourned the matter to a date suitable to Mr. MacIntyre, namely, April 2, 1990. Mr. MacIntyre attended at the scheduled evening session. He did not attend the Board's scheduled 10:00 a.m.

opening time.

The Board has powers under Section 23 of the Municipal Board Act to make rules subject to the Governor-in-Council's approval. The Board made Rules, effective January 1, 1989, for planning matters.

Rule 17 of these Planning Rules reads as follows:

> "(1) In accordance with Section 21(2) of the Municipal Board Act, the municipality which is the Respondent to the appeal shall not later than one week prior to the date of hearing:
>
> a) file with the Clerk two copies of an Appeal Record and one copy of the relevant Municipal Planning Strategy, Land-Use By-law, Zoning By-law, Subdivision By-law or Subdivision Regulations;

On April 2, 1990, the Appeal Record that was filed. The City did not file the Land Use By-law (L.U.B.). The L.U.B. was only tendered as of the date of the hearing after the Board specifically requested it.

The parties active before the Board consented to the jurisdiction of the Board. The Board has reviewed the documents filed. It finds that it has jurisdiction to hear these appeals on their merits.

Mr. Goduto, for the Appellant, called as his witnesses Mr. MacNeil and Douglas Foster. Mr. Campbell for the City called as his witness, Alderman Archibald MacRury.

At the opening of the hearing on April 2nd Mr. Goduto made two preliminary motions. His first motion was to amend his Notice of Appeal. This the Board granted.

Mr. Goduto's other motion criticized the deficiency of the reasons for the refusal required by Section 72(2) of the Planning Act (now known as Section 79(2)). According to Mr. Goduto, this Section required Council, on refusing a development agreement application, to give timely written reasons for its decision to the refused applicant.

The Board heard arguments by both Mr. Goduto and Mr. Campbell on this second motion. It adjourned its decision on the issue to this final decision.

Mr. Goduto argued the Council failed its duty under the Planning Act. He argued that such failure meant the decision of Council was not, and could not be, reasonably within the intent of the M.P.S. He said the appeals should therefore succeed.

If the Board has power to enforce Section 72(2) and was inclined to send the matter back to Council for a rehearing, Mr. Goduto would withdraw his motion. His client did not wish further delay.

On this point, Mr. Campbell argued the City had complied with Section 72(2). If it had not, he argued any remedy the Appellant might have was not the Board's to give. He said the Board's sole power was to determine whether the decision of Council was reasonably within the intent of the M.P.S. It could not grant any remedy for violation of s. 72(2). Any such failure was no Board concern.

Mr. Campbell argued that there was no time limit for the compliance. He said compliance or non-compliance had nothing to do with the intent of the M.P.S.

Mr. Campbell argued that, as the Appellant had attended all meetings on these applications, he knew, by direct observation, the reasons for Council's decision.

Mr. Goduto argued that Council's clear failure to provide reasons under Section 72(2) is an indication Council made its decision for improper reasons or desired to conceal its reasons.

Mr. Foster, the only planner before the Board, in his testimony suggested Council should comply with this Section which is a clear statutory direction. He said, Council, when considering development agreement approvals or refusals, could easily comply with Section 72(2) by adopting the following procedures:

1) That it have a public hearing;

2) That it adjourn its determination on the public hearing for a time to pick out its reasons and incorporate them in the motion rejecting the application.

3) This motion for rejecting the application would then encompass the reasons for refusal. These reasons, in writing, would reach the Applicant in a timely fashion. These written reasons would help the Applicant decide whether he wished to be an Appellant.

(In this case, the defects of lack of reasons for Council's decisions were such that an applicant might easily have wished to go back, change his applications, and try again).

In any event, the Board agrees that Mr. Foster is correct in saying that the above technique would be an appropriate technique to help Council to comply with Section 72(2). It would also be timely in that the person would know the reasons for the decision and have his full 21 appeal days to decide whether or not to exercise his right to appeal.

The M.P.S., under which these applications were made, is rather recent to the City of Sydney. Under the previous M.P.S. and L.U.B., each lot could have contained a four-unit dwelling. Under the new M.P.S. the land is designated L.D.R. The M.P.S. permits no change of zoning by L.U.B. amendment (except by an M.P.S. change together with a L.U.B. change). Such a L.U.B. amendment is not within the power of the Board to review. See Section 51(1) of the Planning Act and Section 63 of the Planning Act (now known as Section 70(1)).

The last M.P.S. shows the clear legislative intent of Sydney Council ratified by the Minister in the manner contemplated by the legislature. That change of intent ensures there will only be rezonings concurrent with M.P.S change and therefore no rezonings appealable to the Board. There will be no more bare bone rezonings possible in Sydney. This legislative intent of Council indicates to the Board the radical recent change of the intent of the M.P.S. This new intent prohibits bare bones rezoning applications. Applicants who previously could apply for rezonings without concomitant M.P.S. changes can now only pursue their development wishes through applications for development agreements.

Mr. MacNeil applied for his two single-unit basement apartments as an addition to the housing stock in Sydney. Each one directly affected only one residential house lot. In the course of his application he applied to the Cape Breton Metro Planning Commission (C.B.M.P.C.). This body is the joint planner for (among other municipalities in the area) the City of Sydney.

Mr. Douglas Foster, the Chief Executive Director and Planner, advised the Appellant how to proceed. He gave the Appellant the materials that he needed to make his application. Mr. MacNeil applied for his development agreements pursuant to Mr. Foster's instructions.

Mr. Foster studied the Appellant's applications. He recommended each to City Council for approval. The development committee of City Council recommended that Council put them to a public hearing.

Before and during the public hearing, there was considerable residents' resistance to both applications. The inhabitants of each street and nearby streets made their views known to Council. Representatives of those groups, at the Board's evening session, succinctly expressed their opposition.

The objections stated by the residents are clear. They are concerned with the matter of absentee ownership of apartment units. They are concerned with the potential of additional development agreements in the area if these two are approved. It is possible that their mainly single family homes as-of-right could become duplexes (double units). This could be extended by development agreement to three or four units per lot. The residents feel the development agreement of one lot on each street would tend to initiate a trend for increases for many other units. The residents complained about traffic. They complained of danger to pedestrians caused by the building of these additional units. The residents complained that the presence of these units would detrimentally affect the value of their nearby properties.

In the course of his duties as planner, Mr. Foster made a report to Council. The Planning Report for 316 Columbia Avenue appears as part of the Appeal Record Exhibit M-9, page 6. The Board will quote certain excerpts starting on an unnumbered page:

> "The sketch marked Appendix "B" and the metes and bounds description marked Appendix "C" show the lot measuring 50 feet along Columbia by 100 feet in depth...
>
> This area is designated Low density residential in the City of Sydney's Municipal Planning Strategy and under this designation, the proposal must meet the general policies covering all development agreements outlined in Appendix "D" as well as the specific requirements for LDR designations attached as Appendix "E"...contains four single family homes, one three unit multiple, the applicant's two unit multiple and one florist allowed under a development agreement. On the opposite side of the street in this block are six single family homes, and one two unit dwelling. The land use on the block face to the rear of the site is four single family homes and one vacant.
>
> Comments:
>
> The proposed conversion would take place within the existing shell and would not require an external fire escape.
>
> The following comments address the intent of policies 25 through 27 of the City's Municipal Planning Strategy:
>
> Policy 25
>
> The proposed use is a three unit residential building

which is within the allowable densities for LDR areas under the M.P.S.

Policy 26

(a) The proposal involves one driveway entrance, which already exists on Columbia Street. The lot is located in mid block and is not near an intersection. This entrance poses no special problems for the safety of vehicles or pedestrians.

(b) The proposed parking layout shows four parking spaces which meets the required number of spaces under the Land Use Bylaw for a three unit residential use.

(c) The proposed site is serviced by municipal water and sewer and poses no special problem to handle one additional unit.

(d) The area is served by hydrants and the building shell will remain unchanged except for internal alterations which must comply with the Provincial Building Code.

(e) The required amenity area is one third of the floor area of the building which is shown on Appendix "B" as 1968 square feet. The required amenity area is therefore 654 square feet which is more than met in the 764 square feet in the rear yard.

...

(h) The applicant will be bound by the exterior layout as proposed by the terms of the draft agreement, which adequately controls the location of fences, walks, and landscaping. Exterior lighting should be directed away from the building as a condition of the agreement.

(i) Internal traffic control is unnecessary for four parking spaces, but the location of the parking and exit are controlled under the draft agreement.

Policy 27

(a) The L.R.I.S. map attached as Appendix "F" is satisfactory as a site plan for the purposes of this agreement. [Emphasis that of the Board].

(b) Appendix "B" is satisfactory as a conceptual plan since no new structures are proposed.

(c) Preliminary drawings are unnecessary since no new structures are proposed.

(d) Sewer and water present no special problem in this area...

The following comments address Policies of the Low Density Residential Designation.

Policy 33

The proposal does not meet the requirements for development by right under the Land Use Bylaw and therefore can only proceed by development agreement.

Policy 34

(c) The proposal qualifies as a three or four unit residential dwelling under 34(c).

(i) No change in the external appearance of the dwelling is proposed.

(ii) The building is an existing two story dwelling and no change in external appearance is proposed.

(iii)The parking area is to the rear of the building and does not, in our opinion require screening.

(iv) Outdoor storage of refuse is not permitted or proposed.

(v) No signs are proposed or permitted.

(vi) The vehicular entrance proposed presents no particular problem in terms of noise, dust or illumination.

...

(viii)The proposed use is residential and is therefore not likely to cause noise, dust or illumination not normally found in a residential neighbourhood.

Recommendation: Staff of the Cape Breton Metro Planning Commission recommends approval of a development agreement to permit the addition of a third basement apartment on the lot in accordance with the plan shown as Appendix "B" and the draft development agreement shown as Appendix "G"."

The report concerning 225 Whitney Avenue follows the same appropriate checklist format. The Board will not repeat it here since the differences are minor. The Planner recommended approval as well of the development agreement for 225 Whitney Avenue.

In the course of his duties in preparing these reports, Mr. Foster wrote to the Fire Chief, the City Engineer and various other City officials for their comments on these particular proposals. He gave each of them a deadline by which to reply. He received no reply. In the absence of a reply, he assumed there were no problems in respect to that inquiry. He said it was easy for him to make this assumption in these cases. They were very minor proposed developments of single unit basement apartments in each case. He has heard no protests from any of the City officials that did not reply at that time or since. He says their silence tends to confirm his opinion the silent ones have no valid objection to the proposal.

Mr. Foster's reports set out the appropriate sections of the M.P.S. that directly apply to these two applications.

The Board has reviewed the entire M.P.S. in order to determine its intent in relation to these applications.

Policy 27 of the M.P.S. reads in part as follows:

> "It shall be the policy of Sydney City Council to require all applicants to submit as part of their application for a development agreement to submit [sic]:
>
> a) an accurate and recent site plan of the area or property for which an agreement is requested, certified by a Nova Scotia Land Surveyor showing the accurate location of all existing and proposed property lines, buildings, structures and land uses;..."

Mr. Foster in his report said the L.R.I.S. sketches produced were adequate compliance with Policy 27(a). The Board is of the opinion that Mr. Foster is wrong. This policy 27(a) is an absolute requirement for an applicant for a development agreement. He must produce this certificate at the application stage. At the hearing, Mr. Goduto produced, for the first time, two surveyor's certificates of a locational nature. The Board is not satisfied that either is recent or that they are certified by a Nova Scotia Land Surveyor for the purposes here required. They appear to be limited certifications necessary for land purchases or mortgages.

Mr. Foster was not aware of what professional requirements there were for Nova Scotia Land Surveyors in relation to such a certificate as that required by the M.P.S. There was no land surveyor present to prove the documents produced by Mr. Goduto were certificates of the type recommended by Policy 27(a) of the M.P.S.

This failure to provide the correct certificates makes both these applications contrary to the intent of the M.P.S. An application contrary to the intent of the M.P.S. cannot form the basis of a supporting decision of council reasonably within the intent of the M.P.S. Conversely, a refusal decision of Council is mandatory when such an application is made.

The Board is not satisfied (but will make no finding) that the conceptual plan produced complies with M.P.S. Policy 27(b).

The Board will make no additional references to the other objections raised by the parties.

The Board will not comment here on the attitude of Councillors in bowing to the demands of the population without much regard to the contents of the M.P.S.

In the past the Board has determined the mind set of Council before determining whether or not its decision reasonably fits the intent of the M.P.S. Because of the clear violation of Policy 27(a), the Board, for the reasons stated previously, can ignore Council's behaviour and mind set when analyzing Council's decision under Section 72 of the Planning Act.

The Board has a duty in this application under 72(4) of the Planning Act.

> "The Board shall not interfere with the decision of Council pursuant to this Section unless the Board determines that the decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the M.P.S....".

The M.P.S. clearly calls for, as a priority, an accurate and recent site plan certified by a surveyor showing certain things. This has not been provided. Therefore the Board cannot interfere with the decision of Council.

The Board therefore must dismiss this appeal pursuant to Section 28 of the Municipal Board Act.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 24th day of April, A.D., 1990.

RICHARD L. WELDON
Member.
NOVA SCOTIA MUNICIPAL BOARD.

MacKEIGAN v. COUNTY OF CAPE BRETON

PLANNING - REZONING - REFUSAL TO REZONE R1 TO RR5 TO PERMIT 10 TOURIST CABINS - BEST INTERESTS OF THE MUNICIPALITY - PLANNING ACT, R.S.N.S. 1989, C. 346 s.70(7).

The Appellant wished to rezone a portion of vacant land in Marion Bridge on the Mira River. The property was in an R1 zone and required RR5 to permit 10 tourist cabins. Council turned the request down without specifying reason. Abutting neighbours opposed but majority of residents in favour. Department of Health and Fitness approval not given. The Appellant was told the wrong time for P.A.C. meeting and it recommended against the rezoning.

HELD: Appeal dismissed.

This is an R1 Zone. The Department of Health and Fitness was unwilling to approve. A water quality study has recommended land controls for the Mira River. There are plans to adopt an M.P.S. for the Mira River area. It is in the best interests of the Municipality in the above circumstances to await this planning process rather than spot rezone.

The error with respect to P.A.C. was administrative. Even if it were deliberate, Board must decide the case based on s. 70(7). Planning Act does not require that applicants be advised of date and time of P.A.C. meeting. County advertised meeting in the newspaper and time was correct.

NSMB-2-90-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act by CARL ROSS MacKEIGAN from a decision of the Council of the Municipality of the COUNTY OF CAPE BRETON refusing to rezone property located at MARION BRIDGE from Residential (R1) Zone to Rural Residential 5 (RR5) Zone to permit 10 tourist cabins.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: BOB BURCHELL, on behalf of the Appellant.

DAVID MUISE, LL.B., on behalf of the Municipality.

HEARING DATES: April 5th and 6th, 1990.

DECISION DATE: May 2, 1990.

DECISION Appeal Dismissed.

DECISION

Carl Ross MacKeigan, the Appellant, has lived in Marion Bridge, Cape Breton, all his life. Marion Bridge is on the Mira River. The Appellant's father owns land in Marion Bridge on the Mira River. Mr. MacKeigan is proposing to develop 10 tourist cabins on a portion of his father's land. He is seeking to rezone the subject property from Residential Single Family (R1) zone to rural Residential 5 (RR5) Zone to accommodate his proposal.

Many of the residents of Marion Bridge support the proposal. They feel tourist cabins would be an asset to the community. Many of them have friends and relatives who they feel would want to stay in the cabins during the summer. Marion Bridge is a beautiful place and many people visit the area.

The owners of the properties abutting the proposed rezoning are opposed to the rezoning. They fear users of the tourist cabins will invade their privacy and will generate noise pollution from late night parties. They are also concerned that the Mira River will be polluted. They feel there are better locations along the Mira River for tourist cabins.

The Appellant's father's property is "L" shaped with the bottom portion of the "L" along the Mira River. The total lot is approximately 9.72 acres. Mr. MacKeigan is seeking to rezone 5.91 acres, a rectangular portion of the lot with both road and river frontage. If the rezoning is approved, he will apply to subdivide the lot along the zoning line.

The subject property is located approximately 780 feet from the southern side of the bridge, which gives Marion Bridge its name, on the northern side of the Mira River. There is 387 feet of road frontage.

The proposed lot has been cleared of trees. Gravel has been removed from a portion of the lot. The Planner's Report makes the following comment: "In its present state, the site is not at all attractive".

There is quite a slope to the land from the road to the river. A person has a good view of the Mira River, the bridge and the surrounding area of Marion Bridge from the property. It is not possible to see the shoreline from the area where Mr. MacKeigan proposes to locate the cabins.

The Appellant initially did not know he required a rezoning before proceeding with the proposed development. He did know that he would require approval before he could install an on-site sewage disposal system. He arranged for William Bailey, the Regional Public Health Engineer, with the Department of Health and Fitness to do a preliminary study of the soil conditions in August, 1989.

In mid-November the Appellant applied for the rezoning to RR5 on the advice of Ken Smith, a Planner with Cape Breton Metro Planning Commission.

Mr. Smith prepared a report for the Council of the Municipality of the County of Cape Breton. In preparation for his report, Mr. Smith contacted Mr. Bailey for his comments. In a letter, dated January 9, 1990, Mr. Bailey made the following comments:

> "The area tested could probably accommodate the sewage from all the proposed cottages and meet the minimum setback requirements from wells, boundaries and the river etc.
>
> The reason I am not being totally committed to this project is as follows: one specific area was tested and I am not sure, because of snow cover, whether this entire area is suitable. A field visit when weather conditions permit may clear up any concerns about setbacks within the site."

Mr. Smith made the following recommendation in his Report to the Municipality:

> "Recommendation: The Planning Commission staff feels that Mr. MacKeigan should spend more time working out the particulars with officials from the Department of Health regarding an on-site sewage disposal system or systems. In doing so, Mr. MacKeigan may find that the type, size and location of the disposal system(s) are within reason for the type of facility he intends to operate. However, there is also a chance that depending upon the recommendations from the Department of Health, the project may be cost prohibitive because of unforeseen conditions.
>
> The Planning Commission staff is not aware of any reasons to suggest that the application is inconsistent with or unnecessary for the protection of the best interests of the municipality, other than the absence of information regarding an on-site sewage disposal system. We recommend approval of the application provided that the applicant receives a positive recommendation from the Department of Health for an on-site sewage disposal system."

While Mr. Smith's Report is dated December 5, 1989, Mr. Bailey's letter of January 9, 1990 is attached as Schedule "A" to the Report.

The Minutes of the Planning Advisory Committee (P.A.C.) on December 12, 1989 indicate that Mr. Smith stated he had received a letter from the Department of Health and Fitness regarding the septic system. If there was an earlier letter, a copy of it was not included in the Appeal Record.

On December 27, 1989, Cape Breton Metro Planning Commission sent a computer generated letter to the Appellant advising of the date for the Public Hearing. The letter also stated that there would be an "Informal Public Meeting" at the regularly scheduled meeting of the P.A.C. on January 9, 1990, at

7:00 p.m. The letter was in error. P.A.C. had rescheduled its meetings to the afternoon. Mr. MacKeigan arrived for the 7:00 p.m. meeting to learn that it had already been held.

The Minutes of the January 9, 1990, P.A.C. meeting indicate that Joyce MacSween, an abutting landowner, was in attendance. She spoke in opposition to the rezoning and presented a petition containing the signatures of area residents opposed "because of the possible adverse effect on the environment, the noise pollution as well as the change in their distinct lifestyle".

The Minutes indicate that the Chairman read the January 9, 1990 letter from Mr. Bailey.

The subject property is in the Municipality's District 13. Councillor Doug Young represents the District. He is a member of P.A.C. He moved that P.A.C. recommend rejection of the rezoning to Council. The motion carried. The Minutes state:

> "Councillor Young advised the meeting that although he supports development he feels the citizens of the area have legitimate concerns and the environmental issues must be taken into consideration in relation to the Mira River".

Council held a Public Hearing on this rezoning application on January 16, 1990. Following the Public Hearing Council voted to refuse the application to rezone. The Minutes are brief. There is a list of persons who spoke in favour or against the proposed rezoning. The Minutes conclude as follows:

> "A number of people were present in the gallery, most in favour of the application.
>
> Members of Council expressed their views regarding the application, both for and against."

There are three municipal districts in the immediate area of the subject property. Warden Joseph MacKinnon represents District 12 on the opposite side of the Mira River. He supports the proposed rezoning. In his capacity as Warden, he did not vote on the motion to reject the application. Councillor Malcolm MacDonald represents District 17 which borders District 12 and is also on the opposite side of the Mira River. He voted for the proposed rezoning. Councillor Doug Young represents District 13 which includes the subject property. He voted against the rezoning.

Following Council's decision, Mr. MacKeigan filed his appeal to the Board.

In addition to the day-time hearing, the Board held an advertised evening session. Many of the residents of Marion Bridge attended. Although the community is divided on whether or not the lot should be used for tourist cabins, there is general agreement that Mr. MacKeigan is a man of integrity who will properly maintain the development. His brother operates a campsite in the area and testified that he has never received any complaints about his operation.

An issue which arose during the Board hearing was the location of a power line over the subject property. The drawing of the proposed development, Exhibit M-7, showed the power line going diagonally across the cabins. After viewing the site, the Board is satisfied that the drawing is inaccurate as to the location of the power line over the property.

Pollution of the Mira River concerned opponents of the proposed rezoning. In order to address this issue, the Appellant called several employees of the Nova Scotia Department of the Environment. Gordon MacDougall, the Regional Manager for the Department, introduced a copy of a joint study of the Mira River done in 1989. The purpose of the study was to update an earlier study in 1975 "thereby establishing the current picture of river water quality and identifying any areas of environmental or health concern to ensure the protection of the Mira River."

The conclusion of the study is "the Mira River has a water quality considered more than suitable for recreation use and shows no deterioration from the 1975 survey". The study goes on, however, to recommend the development of land use controls along the Mira River. The concluding two paragraphs of the study are as follows:

> "It is the understanding of the authors of this report that the Municipality of the County of Cape Breton is intending to develop a planning strategy for the districts bordering on the river. Such a strategy - with the essential public and professional input - should go a long way in providing the necessary land use controls referred to in the 1976 report. It is recommended that the planning strategy for each district bordering the Mira River, be developed concurrently to ensure that land use in watersheds is compatible with all proposed and existing uses of the river.
>
> Finally, as stated previously, the Mira River water quality falls under the minimum requirements for recreational water quality. This is very positive, but the result could be misinterpreted by some as indicating there is little danger of pollution and that monitoring the vigilance can be relaxed. If the Mira River was reclassified to more stringent standards such as those applied to aquatic life, then the long term life of the river may be better assured. Such a goal of reclassification can be carried out with the assistance

> of the Nova Scotia Department of Environment but primarily, developmental controls created in the proposed planning strategy will be the key in providing future safeguards for the river."

There is no Municipal Planning Strategy (M.P.S.) for this part of Cape Breton County. Some districts in the Municipality have their own M.P.S. Although the Mira River flows through a number of Districts, the Municipality has decided to prepare an M.P.S. for the whole of the area along the Mira River starting in September or October, 1990. This decision supports the recommendation of the Study quoted above that the planning strategy for each district bordering the Mira River be developed concurrently.

In the absence of an M.P.S. for the area, the Planning Act provides that the Zoning By-law or Land Use By-law (L.U.B.) applies. In this case it is the 1980 L.U.B. which applies. Under the L.U.B. the subject property is zoned R1. The property has been zoned R1 since at least 1966. The Municipality has amended the Zoning By-laws and/or L.U.B.'s several times since 1966 but this part of Marion Bridge has remained R1.

Ken Smith, Planner with the Cape Breton Metro Planning Commission was unable to determine why the R1 Zone was originally put in place. He suspected that it was to control certain types of land uses such as mobile homes or agricultural uses. Most of the other land with water frontage along the Mira River are zoned Agricultural 2 (A2) or one of the Rural Residential Zones.

It was also suggested that the R1 Zone might be in effect in that area because it is more of a village community than strictly a rural area. Land on both sides of the bridge is zoned R1.

The permitted uses in the Rural Residential 5 (RR5) Zone are similar to the permitted uses in the Residential Single Family (R1) zone with the addition of Public and Private Parks and Tourist Cabins. The chart below lists the permitted uses in each zone as set out in the L.U.B.

R1 USES PERMITTED

Single family detached dwellings and day nurseries
Duplex dwellings
Semi-detached dwellings
Schools and community centres
Churches
Hospitals
Cemeteries
Converted dwellings up to two (2) dwelling units
Senior Citizen apartments (owned and operated by a Regional Housing Authority or the Nova Scotia Housing Commission).

RR5 USES PERMITTED

Detached dwellings
Semi-detached dwellings
Duplex-dwellings
Schools and community centres
Hospitals
Churches
Cemeteries
Day Nurseries
Public or Private parks
Converted dwellings up to two (2) dwelling units
Tourist cabins
Senior Citizen apartments (owned and operated by a Regional Housing Authority or the Nova Scotia Housing Commission).

In an appeal from a rezoning where there is no M.P.S., Section 70(7) of the Planning Act, R.S.N.S. 1989, c. 346 (formerly s. 63(6) of the 1983 Planning Act) applies. The Section states:

> "70(7) Where there is an appeal from a decision of Council with respect to a zoning by-law in force by Section 124, the Board shall not interfere with the decision unless the decision of Council is inconsistent with or unnecessary for the protection of the best interests of the municipality."

The Appellant argued he received incorrect advice as to the time of the P.A.C. meeting and thereby was denied his right to present his case to P.A.C. The Board has determined that the error was an administrative one and not deliberate. Even if the error was deliberate the Board must decide the case based on Section 70(7) quoted above. The Board can understand the Appellant's concern given that P.A.C. recommended against the proposal. P.A.C.'s recommendation often influences Council's decision.

The Planning Act does not require that applicants be advised of the date and time of the P.A.C. meeting. The Municipality of Cape Breton has chosen to notify applicants and also advertises the time and date of P.A.C. meetings in the newspaper. In this case, the newspaper advertisement did have the correct time.

Council held a public hearing. Mr. MacKeigan had an opportunity both through his counsel and on his own to address Council. He could have withdrawn his application and reapplied. This would ensure that P.A.C. heard his presentation, however it would have delayed the process. It might not have been a satisfactory solution to Mr. MacKeigan.

Mr. Burchell, representing the Appellant, referred to an earlier decision of Council which was appealed to the Board: Long et al v. Cape Breton County (1989) 8-B (Vol. II) M.B.D. 580. The decision dealt with land in Middle Cape. Council rezoned 15 acres from Residential R1 and Agricultural A2 to commercial C1 and C2 to permit a motel and campground. The Board upheld Council's decision. Mr. Burchell argued that Council's decision not to rezone the Marion Bridge property was inconsistent with the Council's decision respecting the rezoning in Middle Cape.

Mr. Muise, for the Municipality, argued that there were differences between the two properties. He argued, in any event, inconsistency in Council's decisions was not the test for the Board to consider.

The Board finds there is merit in the positions of both parties. Mr. Burchell is right that the Board must consider the Long decision. Mr. Muise is also correct in stating that the determining test is not inconsistency between Council decisions.

The Board must assess Council's decision to determine if it is inconsistent with or unnecessary for the protection of the best interests of the Municipality. In this case, Council Minutes give no indication of the reasons for Council's decision. The Minutes show Council heard from persons both for and against the application for rezoning. The Minutes state the majority of the persons present favoured the rezoning.

The Planner's Report recommended approval of the proposed rezoning, subject to the obtaining of a positive recommendation from the Department of Health and Fitness. In the Board's opinion, however, the Planner's Report raised a number of issues which might have led to a negative recommendation of the proposed rezoning.

The subject property is in the middle of a R-1 Zone surrounded by single family homes. The area surrounding the bridge, including the subject property, gives the impression of a village.

The P.A.C. recommended against the rezoning. A review of the Minutes indicates that potential adverse effects on the environment and particularly the Mira River and the need for further testing before approving the sewage system were both raised. Reliance on the P.A.C. recommendation is problematic given that P.A.C. only heard one side.

Council has approved the preparation of an M.P.S. for the whole of the Mira River area. The Water Quality Study recommends land use controls in the area.

All of these factors could be taken into account and would support a finding that Council's decision was consistent with and necessary for the protection of the best interests of the Municipality.

On the other hand, Council did rezone land in Middle Cape and the Board upheld Council's decision. There are differences in the two cases. The property in Middle Cape is almost three times larger than in Marion Bridge. Many of the surrounding properties in Middle Cape are summer cottages and are not used as year round homes. The property is more remote and does not appear to be a village.

Some other differences are the planner in Middle Cape recommended against the rezoning in part because the Department of Health and Environment had not given its approval. The majority of the residents who attended the Middle Cape public hearing were against the rezoning. Council voted in favour of the rezoning in Middle Cape.

One concern the Board has raised in previous decisions is Council reacting largely on the basis of the number of residents for or against a proposal regardless of the Planning merits. In both Middle Cape and this appeal, Council has shown that it is not making its decisions based solely on the views of the majority of residents in attendance at the public hearing.

The Board acknowledges the desire of many local residents to have cabins in the area for the use of friends and relatives. The Board also acknowledges the desire that a responsible person such as the Appellant operate these cabins. These desires do not necessarily establish this site as the best location for such cabins.

This is an R1 Zone and has been for some time. The Department of Health and Fitness was unwilling to give its approval without additional testing. A water quality study has recommended that land controls be put in place for the Mira River. There are plans to adopt an M.P.S. for the whole of the Mira River area. It is in the best interests of the Municipality in the above circumstances to await this planning process rather than spot rezone.

The Board is not satisfied that Council's decision is inconsistent with or unnecessary for the protection of the best interests of the Municipality.

Therefore, the Board dismisses the appeal and confirms the decision of Council.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 2nd day of May, A.D., 1990.

LINDA GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

MacNEIL ET AL v. TOWN OF TRURO & PURDY

PLANNING - L.U.B. AMENDMENT - R-6 TO R-3 - COVENANT AGREEMENT - NEIGHBOURHOOD - WORST CASE SCENARIO - PLANNING ACT, s. 70.

The Applicant sought to rezone 2.2 hectares of vacant land from Residential Rural to Medium Density. No detailed plans for development were included. Same property subject to two earlier Board decisions. Council approved rezoning on basis of including a restrictive covenant.

HELD: Appeal Allowed.

There is a demand for medium density residential uses in Truro. The definition of neighbourhood "varies from situation to situation". The property does not directly intrude upon any existing development. The M.P.S. shows a definite intent for the encouragement of residential growth within the limits of the Town.

In the absence of a specific proposal, council should assess the proposed amendment on a worst case basis. Council must determine if there is sufficient information provided to enable it to meet its responsibilities.

The covenant agreement was an integral part of Council's considerations. The use of the covenant agreement was an attempt to exercise legislative power by contract. The M.P.S. does have provision for development agreements but not for this part of Town. One cannot use a covenant to achieve a development agreement where one is not available.

NSMB-25-89-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, by DONALD MacNEIL, GORDON KINSMAN, PAUL EATON, JUNE MUIR, LOIS PERRIN, CECIL BROWNELL, WILLIAM YOUNG, EDWARD POOLE, FRANK HENNESSY and SYLVAIN MURDOCK from a decision of the TRURO TOWN COUNCIL made July 4, 1989, which amended the Land Use By-law by rezoning approximately 2.25 hectares of land owned by RAYMOND PURDY, located on the east side of Young Street abutting civic numbers 269 Young Street to the north, from R-6 to R-3 (Residential Medium Density).

BEFORE: MICHAEL G. JOHNSON, F.C.A., Chairman.

COUNSEL: GORDON B. KINSMAN, on his own behalf and on behalf of the other Appellants;

DAVID W. GRUCHY, Q.C., for the Town of Truro;

JAMES F. RICHARDS, LL.B., for the Applicant to Council, Raymond Purdy and Shelby Purdy & Son Ltd.

HEARING DATE: March 6, 1990;

BRIEFS SUBMITTED: Argument - March 19, 1990;
Rebuttal - March 26, 1990;

DECISION DATE: May 23, 1990.

DECISION: Appeal Allowed.

DECISION

The property subject to this appeal is approximately 2.25 hectares of land owned by Raymond Purdy and located on the east side of Young Street directly opposite Glenwood and Beechwood

Drives. Young Street is a major arterial street running in a southerly direction from approximately the centre part of the Town of Truro. This land was zoned Residential Rural (R-6). The land is bounded on the west by Young Street, on the south by other lands owned by Mr. Purdy, on the north by apartment buildings and recreation land and on the east by the Lewis Road which forms part of the western boundry of Victoria Park. Victoria Park is a major recreational park for the use of the citizens of Truro. The topography of the lot slopes from the southwest to the northwest away from Young Street and towards Victoria Park. This site is an open field without tree cover and has been used as a pasture and sometimes hayfield in the past. The property located directly adjacent to the north and the properties across Young Street, at the corner of Glenwood Drive are developed in other than a single family residential manner. There is no development situated on the lands to the south. Mr. Purdy is the owner of a considerable portion of these lands to the south and lives in the area.

The subject land has been part of two previous appeals before the Board. In the first, Town Council had allowed the rezoning but on appeal to this Board, Council's decision was overturned: Benedict v. Town of Truro (1985) 4-B M.B.D. 291. In the second, Town Council refused the rezoning and on appeal to this Board Council's decision was upheld: Wallace v. Town of Truro (1988) 7-B M.B.D. 315.

On April 27,1989, Raymond Purdy made application to have the land rezoned to Residential Medium Density (R-3). There were no detailed plans for the development of the subject property included with the application.

In a report dated May 29, 1989, Peter A. Nelson, the Director of Planning and Development for the Town of Truro, recommended approval of the requested rezoning.

The Town Planning Advisory Committee (T.P.A.C.) at its meeting on May 29, 1989, heard from Mr. Purdy concerning his proposal and reviewed the Planner's Report. At this meeting it was agreed that the T.P.A.C. would meet with Mr. Purdy "in committee" to discuss detailed proposals. The meeting was advised that the Town Engineer was satisfied that adequate servicing would not be a problem. The committee was also advised that the Police Chief did not feel that traffic would be a problem.

The "in committee" meeting was reported to Council at its June 5, 1989, meeting when Council approved advertising a public hearing for the proposed rezoning.

At its meeting on June 26, 1989, the T.P.A.C. agreed to recommend the rezoning to Town Council provided Mr. Purdy "provide a letter of covenants on such land". These covenants arose as a result of the "in committee" meeting of T.P.A.C. with Mr. Purdy in an effort to reduce public concerns relative to the zoning request. The minutes of the meeting note "that covenants would provide a measure of public protection".

Donald MacNeil representing the Glenwood Homeowners Association also appeared at this meeting in opposition to the proposal. The minutes show that Mr. MacNeil "read a prepared statement advising of the concerns as follows:

1. Lack of demand as per vacancy rate.
2. Require a measure of stability for the area.
3. Possibility of 175 units is too great.
4. Young Street traffic already heavy.
5. Problems with drainage and erosion.
6. Request rejections of proposal under P267 and request any proposal be done by Development Agreement."

These minutes also show that the committee was advised by Mr. Nelson that the current vacancy rate for rental dwelling units in the Town area was approximately 5%. Mr. MacNeil noted that Canada Mortgage and Housing Corporation (C.M.H.C.) states a vacancy rate of 5.1%.

The "in committee" meeting held with Mr. Purdy was the subject of an unsuccessful certiorari application against the Town of Truro. (Donald MacNeil et al v. Town of Truro et al, 1989, S.T. 03735 (unreported)).

Council held the public hearing at its meeting on July 4, 1989. The Minutes of the meeting are quite detailed. They note the following matters:

- the attendance of approximately twenty citizens from the area;
- the attendance of Mr. Purdy with his solicitor Mr. Richards;
- a letter from the Department of Environment;
- specific provision of a covenant agreement;
- a petition from residents abutting Mr. Purdy's property supporting the application;

- Peter Nelson reviewed his report. This report included direct reference to relevant Municipal Planning Strategy (M.P.S.) Policies.

- the T.P.A.C. reported on their deliberations.

- the Town Solicitor, Mr. Gruchy, advised Council that the covenant "agreement is legally binding on the property owner and that the covenants were more restrictive than Town By-laws".

- references by Mr. Nelson and Mr. Richards to (M.P.S.) Policies 211, 212, 266 and 501.

- Traffic on Young Street.

Donald MacNeil, again representing the Glenwood Homeowners Association, made a presentation to Council opposing the rezoning. The minutes state "with Council discussing the various policies applicable to the rezoning with Mr. MacNeil and previous Board decisions". Mr. MacNeil provided Council with a copy of the submission. Specific references were included in the submission to the previous Board decisions Benedict and Wallace. The submission also included direct references to M.P.S. policies 203(a), 211, 212, 266, 277, 501 and 501(c).

A considerable amount of the Minutes dealt with the wording and various considerations relating to the covenant agreement. Council approved the rezoning "with the inclusion of the covenants". The specifics of this covenant were contained in Schedule "A" of an agreement between Shelby Purdy & Son Ltd. and the Town and are as follows:

> "The Owner, for itself, its successors, assigns and successors in title to the Lot, covenants as follows:
>
> 1. The Lot shall not be used except for residential purposes and to erect thereon grouped dwellings or

apartment buildings.

2. The buildings on the Lot shall not contain, in total, more than twenty-eight (28) dwelling units multiplied by the number of acres of land in the Lot.

3. No more than two (2) driveways leading to and from Young Street, in the Town of Truro shall be constructed on the Lot and there shall be no access to the Lot from Young Street by motor vehicles except by way of the said driveways.

4. No structure shall be erected on the Lot within thirty-five (35) feet of any sideline of the Lot.

5. Not to commit, suffer, permit or carry on any activity on the Lot that results in any common or public nuisance and to observe and comply with all laws, bylaws and regulations enacted by any governmental authority intended for the protection of the environment.

6. Each driveway leading to Young Street from any building on the Lot and each parking lot constructed on the Lot shall be paved with asphalt within ten (10) months of its construction and no such driveway or parking lot shall be permitted to remain unpaved with asphalt beyond the said period.

7. All land on the Lot that is within thirty-five (35) feet of any building erected on the Lot and that is not used as a walkway, driveway or parking lot shall be grassed or otherwise suitably landscaped, whether permitting, as soon as reasonably practicable following the completion of the building and all landscaped portions of the Lot shall be properly maintained.

8. For the purposes of this schedule, each of the words or phrases "erect", "erected", "building", "dwelling unit", "apartment building", "grouped dwelling" and "structure" shall have the same or corresponding meaning as the meaning ascribed to it in the Town's aforesaid Zoning By-law.

9. The north, south and westerly boundaries of the lot shall be buffered by trees and wherever used herein "landscaping" shall include the provision of trees."

On July 11, 1989, the approved amendment was advertised in the Truro Daily News. On August 1, 1989, the Board received the Notice of Appeal from the Appellants.

The Board determined that Donald MacNeil, one of the Appellants was a qualified Appellant. He met the requirements of an aggrieved person as contained in Section 70(2) of the Planning Act R.S.N.S. 1989, c. 346 (formerly s. 63(1A)).

In addition to Gordon Kinsman and Donald MacNeil, four other witnesses appeared on behalf of the Appellants. Paul Eaton and Allen Young, both residents of the area, stated their various reasons for opposing the rezoning.

Elizabeth Deluisa presented various facts concerning a vacancy rate for the Town of Truro and the surrounding area. Ms. Deluisa is a market analyst for C.M.H.C.

Peter A. Nelson, Director of Planning and Development for the Town of Truro, reviewed certain aspects of his report to Town Council. He stated his interpretation on a number of sections of the M.P.S. Mr. Nelson was qualified by the Board as an expert entitled to give opinion evidence on planning matters affecting the Town of Truro.

No witnesses were called by either the Applicant or the Town.

Portions of the evidence presented by Ms. Deluisa and Mr. Nelson will be discussed later in this decision.

The Board held an evening session for members of the general public to give evidence. Frank Hennessy, the only witness, read a prepared statement opposing the rezoning.

Section 70(4) of the Planning Act (formerly s. 63(3)) requires that:

> "The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy."

Section 70(6) (formerly s. 63(5)) restricts the Board's powers as follows:

> "The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

In carrying out its review of M.P.S. policies and consideration of the evidence before it, the Board must always keep this direction foremost.

This rezoning application was made under the provisions of Policy 212 of the M.P.S. This Policy is contained in the Section of the M.P.S. under Land Use Policies - Residential, in the fourth section under the heading "Development Opportunities". The overall preamble of this Section states in part as follows:

> "4. DEVELOPMENT OPPORTUNITIES
>
> Towns in Nova Scotia have experienced a general trend of residential development occurring outside their boundaries... Although the Town cannot single-handedly change this trend, it can encourage such change by self-promotion and ensuring a wide range of development opportunities do exist."

There is a specific preamble to Section 212 included under the heading "Future Medium Density Residential Uses in Low Density Residential Areas" which states:

> "Over the years there has been considerable demand for medium density land uses within undeveloped low density residential areas. This demand is still evident. Rather than attempt to predetermine such medium density areas without further study of the situation, it was decided, that Council should consider zoning to medium density use

within low density residential areas based on demand...".

This preamble goes on to state:

"This should not be interpreted to:

1) accommodate isolated incidences or structures of medium density development; or

2) areas which must make use of local streets in which to gain access to the above collector or arterial streets unless such streets are for the sole use of the area being zoned; or

3) include in existing low density residential areas.

Policy 212 of the M.P.S. states as follows:

"P-212 - Permit by zoning amendment medium density residential uses in low density residential areas as indicated on the Future Land Use Map provided:

- that there is 2 or more hectares involved, and
- that the area is abutting or has independent access to a collector or arterial street."

The subject property is in excess of 2 hectares and it abutts an arterial street as required by Policy 212.

The proposed rezoning would not be contrary to any of the three criteria listed in the preamble to policy 212.

The main issue before the Board relating to this policy centers around the interpretation of the word "demand" as included in this preamble.

The Oxford Dictionary of Current English defines "demand" as follows:

> "DEMAND - request made as a right or peremptorily; urgent claim; popular desire for goods or services. make a demand for; insist on being told; require, call for; in demand much sought after; on demand as soon as asked for."

Mr. Nelson states that his interpretation of the phrase "based on demand" means "when an applicant requests a rezoning". This interpretation meets the above definition under the "requests made as-of-right" or "as soon as asked for". This was also his position on both the previous appeals before the Board. In reference to this interpretation, the Board, on page 323, of the Wallace decision stated:

> "An examination of the preamble indicates that this is a possible interpretation".

The Board goes on in this same paragraph to state:

> "If we accept this interpretation however it merely requires Council to consider the request. It does not make it mandatory that Council approve the rezoning."

The Appellants on the other hand prefer the definition "popular desire for goods or services". In this case we would read "rental properties" in place of "goods or services".

Elizabeth Deluisa testified that the present vacancy rate for apartment units in Truro per C.M.H.C. calculations was at 4.5%. This would indicate that there was a slight oversupply of apartments in the Town. In her opinion a 3% vacancy rate would represent basically "a balanced market". Under cross-examination she indicated that her statistics did not give any recognition as to the quality of apartment suites available. Under questioning from the Board she agreed that a 3% vacancy rate would be considered 100% (full) occupancy, allowing for changeovers and repairs to apartments. This 4.5% vacancy rate is a drop from the 5.1% rate reported in the minutes of T.P.A.C.

In the Benedict decision the Board examined demand from the point of view of the "popular desire" definition and stated the following at page 319:

> "Based on the evidence at the hearing the Board is not satisfied that a demand for medium density uses has been made out."

In Wallace the Board also looked at the word "demand" from the same interpretation as Benedict and stated the following at page 323:

> "The Board accepts the evidence of Miss Erskin Doucette which supports the contention little demand exists".

Miss Doucette was also from C.M.H.C.

The Board notes in the Wallace appeal it was stated that the vacancy rate for the Town of Truro was approximately 7% at the time. The rate has now dropped to 4.5%.

The Board does not believe that a 4.5% vacancy rate as determined by C.M.H.C., would indicate an absence of "demand" for rental properties in the Town of Truro.

The Board also looked at the interpretation of "demand" from the point of view of the owner of the property and the developer. The subject property has been under review for rezoning for some considerable time with a number of applications being presented to the Truro Town Council in various forms. It is difficult for the Board to imagine that if there was no requirement or need or "popular desire" for additional apartment spaces in the Town of Truro, that these requests for rezoning would be so persistent. Obviously someone thinks that these apartments would be rentable and that a financial institution could be convinced to provide money to construct them. Common sense would suggest that if there was no "demand" for apartments, then a developer would not try to commence construction and financing would not be provided by reputable lenders.

As previously noted Section 4 of the Land Use Policies - Residential of the M.P.S. is titled "Development Opportunities". From a reading of the preamble included with this section the Board notes that, at the time of the formation of the M.P.S., the Council was very concerned about the general trend of residential development occurring outside the boundaries of the town. The M.P.S. was designed to ensure that development opportunities existed within the Town to help correct this trend.

The Appellants point out that the expected growth at the time of the formation of the M.P.S. has not occurred within the Town limits. Therefore, the need (demand) for medium density residential uses would be reduced even further.

Evidence shows that there has been considerable increases in population and medium density residential development in the areas surrounding Truro such as Bible Hill, Salmon River, Lower Truro and Hilton. These areas are located within the Municipality of Colchester. Therefore, the trend towards growth occurring outside the boundaries is still a very real situation. As such the Board feels that Council is correct in interpreting that there is still a need (demand) for more medium density residential uses within the Town limits to correct this trend. Any encouragement in this growth must still be within the intent of the M.P.S.

From the foregoing discussion on the various interpretations of "demand" and based on the evidence before it the Board is satisfied, this time, that there is a demand for medium density residential uses within the Town of Truro. In the Board's opinion, Council's decision in respect to Policy 212 was consistent with the intent of the M.P.S.

Policy 211 of the M.P.S. is contained in the M.P.S. at paragraph (f) of the third section of the Land Use Policies - Residential. This section is headed "Framework for the Future". It states as follows:

> "(f) That there are attributes of living in the Town as well as at the urban fringe and that these settlement characteristics have both social and economic roots that go beyond the scope of a Municipal Development Plan. One characteristic which is fundamental to a Municipal Development Plan is the security which comes from knowing that the future of the neighbourhood is predictable by virtue of zoning and planning guidelines, offering security to investment.
>
> P-211 Administer this plan and corresponding Zoning By-law in a judicious and expedient manner to curtail illegal land uses and to ensure a sense of security in Town."

The Appellants have taken a rather narrow point of view as to the definition of the words "sense of security in the Town" and "neighbourhood".

If the full text of Section 3, Framework for the Future, is read, a somewhat different point of view may be seen. Paragraph 3.2 states that:

"This document indicates quite clearly that the Town has

> problems attracting residential development. Although this situation may be related to external government policies and the economic climate, there are internal issues which the Town should address."

The Section goes on to list a number of these issues from paragraphs (a) to (f). Paragraph (f) being the one where policy 211 is stated. This Section on Framework for the Future concludes with the following:

> "No one of these issues can be said to be responsible for the current no-growth situation which the Town is experiencing but all of them contribute, and if there is to be a trend reversal these must be actively addressed."

Paragraph (f) was obviously in place so that there would be a check on the possibility of any wholesale rezoning, in a unplanned manner, in order to achieve the required growth. A careful reading and interpretation of the intent of the whole Section indicates to the Board that it would not be appropriate to provided too narrow an interpretation on a definition of "sense of security".

If the Appellant's position were adopted by the Board, then the Board believes it would be extremely difficult for any medium density development to occur in the subject area forever. The M.P.S. contemplates that changes can and must be made within the Town limits to encourage future growth.

The definition of what constitutes a neighbourhood is not easy to distinguish and would vary from situation to situation. In this appeal the Board feels that there are two possible definitions, one broad and one narrow. The broad definition would include all properties on the south of Glenwood Drive, all properties on the north as far as Brunswick Street, all lands on the east of Young Street and all lands on the west to Willow Street (i.e. all South Truro). The narrower definition would be confined to the specific properties to the north of Glenwood Drive including Beechwood Drive, Lawnwood Drive and Fairview Drive.

In the facts present for this appeal the Board favours the narrower definition. The Board notes that the subject land is not located within the boundaries of either neighbourhood definition. It does not directly intrude upon any existing development. The property is abutted by undeveloped land to the South, Victoria Park to the East, apartment buildings to the North and Young Street, an arterial street, to the West.

The Board considered Policy 211, in the Benedict decision. This decision discussed "sense of security" to some length. Its final conclusion was that Council had not considered all the relevant aspects of the policy and therefore had failed to comply with the policy. In the Wallace decision the Board noted at page 328 that "the Board's comments in Benedict on Policy 211 .... still apply and may well have influenced Council".

The Minutes of Council meeting of July 4, 1989, show that Policy 211 was before the Councillors for consideration. It was addressed during the presentation on behalf of the applicant Mr. Purdy. It was also discussed in the Planner's Report which, according to the Minutes, was reviewed by Mr. Nelson at the Council meeting, and a copy made available to all Councillors. The minutes also show that the Board's Benedict and Wallace decisions were discussed by Council members. This "sense of security" issue was also addressed in the report to Council of the T.P.A.C. deliberations which led to the request for covenants.

Council made its decision and carried out its deliberations based on the understanding and advice that the covenant agreement was a legally binding document and a legitimate planning procedure. Where the provisions of the covenants have an implication on Council's deliberations and the intent on specific sections of the M.P.S. the Board will consider the covenants with a similar understanding. The overall implications of the use of a covenant agreement on the intent of the M.P.S. will be discussed in more detail later in this decision. The Board's following comments concerning intent and consistency of specific M.P.S. policies are subject to the final consideration of the effect of the covenants.

It is the Board's opinion that this time Council did consider the implications of Policy 211 in relation to the proposed rezoning. While Council obviously accepted a broader interpretation of a "sense of security in the Town" than would be desired by the Appellants, the Board is of the opinion that Council was within the overall intent of the M.P.S. in determining as it did.

The Appellants point out that the subject property is included in what is colour coded as a residential low density area of the Future Land Use Map (FLUM). This map forms part of the M.P.S. As such they contend that this would not be in keeping with Policy 203(a) of the M.P.S. which states:

> "P-203(a) - Designate on the Future Land Use Map areas of medium to high density residential development.

If the appellants' position were to be accepted then Policy 212 would be unnecessary. Policy 212 shows a clear indication of an intention to rezone two or more hectares of land to "medium density residential uses in low density residential areas as indicated on the "FLUM"." To interpret otherwise would be contrary to the intent of the rezoning provisions of this Policy.

This intent is further enhanced by a review of the preamble to this policy. It states as follows:

> "It is intended in this plan to encourage medium to high density residential uses, in and around the downtown area, to maximize the land use densities within these areas. This contemplates a mixture of residential activity from medium density uses such as triplexes, low rise apartments, town houses, etc. to high density activity such as high rise apartments. The intention here is the intermixing of two distinct land uses, medium and high density."

The Board notes on the FLUM that the medium to high density areas marked thereon are in fact confined to the perimeter of the downtown area and are located on lands that are currently zoned commercial or industrial for the most part. This is obviously in keeping with the preamble to Policy 203(a).

The Board does not believe that it was the intent of the M.P.S. to restrict medium density residential areas strictly to these locations only. This would not be in keeping with the expressed intent to encourage residential growth within the confines of the City as expressed elsewhere and discussed earlier.

This need for growth within the Town is also expressed in Policy 208 and the preamble thereto which is as follows:

> "(c) That Truro has the opportunity to be one of the growth towns in the Province, being located in the second fastest growing area in the Province. The Town's share of this growth over the past ten years has averaged only 20% of new housing starts of the area immediately surrounding the Town.
>
> Therefore, it shall be a policy of Council to:
>
> P-208 Encourage by the use of this plan and whatever other means possible, residential development to occur within the Town."

A reading of the complete Land Use Policies - Residential of the M.P.S. shows a definite intent for the encouragement of residential growth within the limits of the Town. This intent is to reverse the trend toward residential development outside Town boundaries. It is the Board's opinion that Council in its deliberation considered the relevant policies of the M.P.S. contained within this Part and that the decision related thereto is consistent with the intent of the M.P.S.

As already discussed, Policy 212 provides the conditions under which the subject property could be eligible for rezoning. Policy 510 provides the criteria under which such an amendment could occur. Policy 501 and its preamble is as follows:

> "2.2 Criteria for Amendments to the Zoning By-law
>
> In amending the Zoning By-law Council shall follow specific criteria. Such amending criteria shall insure that the amendment is:
>
> i) in conformance with the intent of this Plan,
> ii) not premature,
> iii) not in conflict with nearby or adjacent uses,
> iv) physically suitable, and

v) adequately buffered where required.

Therefore, it shall be a policy of Council to:

P-501- In considering amendments to the Zoning By-law, in addition to all other criteria as set out in various policies of this Plan, Council shall have regard to the following matters:

a) That the proposal is in conformance with the intents of this Plan and with the requirements of all other Town By-laws and regulations;

b) That the proposal is not premature or inappropriate by reason of:

i) the financial capability of the Town to absorb any costs relating to the development;

ii) the adequacy of sewer and water services and utilities or if services are not provided, the adequacy of physical site conditions for private on-site sewer and water systems;

iii) the adequacy and proximity of school, recreation, and any other community facilities;

iv) the adequacy of road networks in, adjacent to, or leading to the development;

v) the potential for the contamination of watercourses or the creation of erosion or sedimentation;

vi) creating a leap-frog, scattered or ribbon development pattern as opposed to compact development;

c) That controls are placed on the proposed development so as to reduce conflict with any other adjacent or nearby land use by reason of:

i) type of use;

ii) emissions including air and water pollutants and noise;

iii) height, bulk, and lot coverage of the proposed building;

iv) traffic generation, access to and egress from the site, and parking;

v) open storage;

vi) signs;

vii) similar matters of planning concern.

d) Suitability of the proposed site in terms of steepness of grades, soil and geological conditions, location of watercourses, marshes, swamps, or bogs and proximity of highway ramps, railway right-of-ways and other nuisance factors.

e) Provision for buffering, screening and access control to reduce potential incompatibility with adjacent land uses and traffic arteries."

One of the main issues relating to this policy centers around the use of the word "proposal" in the various sections of this Policy. The Oxford Dictionary of Current English defines "propose" as:

> "put forward for consideration; have as one's plan or intention; make proposal;..."

It further defines "proposal" as:

> "act of proposing something; course of action, proposed;..."

When assessing the criteria of Policy 501 and similar policies in other M.P.S.'s in the past the Board has examined "proposal" from the definition of "have as one's plan or intention" or a "course of action proposed".

The Board also has some sympathy with the argument that the request for rezoning could be considered as the "proposal" referred to in paragraphs (a), (b) and (d) of Policy 501. The request of the Applicant, Mr. Purdy, for a rezoning of the subject lands would meet the broad definition of the word "propose". In other words, he "put forward for consideration". His application was "an act of proposing something".

Mr. Purdy's original application for rezoning contained no other information beyond the request for a change in zoning from R-6 to R-3. There was no specific plan at that time for Council to consider.

The Board is of the opinion that, in the absence of a specific proposal in advance of Council's decision, Council should consider the proposed amendment and assess the criteria on a worst case scenario basis in order to carry out its responsibility appropriately. Should council be unable to exercise its discretion in such a manner then it should request further information or refuse the amendment.

There is evidence in the minutes of Council and attachments thereto that many aspects of a worst case scenario were before Council for consideration.

At the time Council considered the matter there was a proposal before Council in the form of the covenant agreement. It appears that Council considered the covenants as forming the proposal for purposes of Policy 501.

As already mentioned the Board will consider the use of the covenant agreement in more detail later but for now, will continue to consider it in the same manner as Council did.

In past decisions the Board has determined that where details of a proposed development are provided it is not necessary to consider the worst case scenario. At page 326 of the Wallace decision the Board had the following to say:

> "The Board has in the past stressed that where the M.P.S. refers to "the proposal" Council must consider the various criteria in light of the proposed development and must not place undue emphasis on the worst case scenario. A rezonning application is based to a certain extent on trust. If an applicant radically changes the development once the rezoning is approved then any future applications are likely to be treated very cautiously by Council."

It has been argued that any specifics of a proposed development are not enforceable in law. Once a rezoning has occurred, development can proceed "as-of-right". Therefore a "worst case scenario" should be considered. However, as noted above, in past decisions the Board has determined that, where there is a proposal, a Council acts responsibly by considering the proposal, based to a certain extent on trust. In such a case, Council is not required to consider the "worst case scenario".

In Wallace and Benedict, Council and the Board carried out the review based on the detail provided and did not consider the "worst case scenario".

The Appellants contend because there were no specific details provided with the proposed rezoning, Council's decision could not be consistent with the intent of the M.P.S. In the Wallace decision, the Board made the following comment at page 327:

> "Where an Applicant does not fully disclose his or her intentions it is difficult for Council to give full consideration to the relevant criteria and to be satisfied that it is an appropriate case for rezoning. The Board recognizes that it is not always economically feasible to prepare detailed plans in advance of Council's decision. It is, however, possible to give some details as to the applicant's intentions with respect to the various criteria."

Council must consider each application to determine if there is sufficient information provided to enable it to meet its responsibilities. In many circumstances Council would not be within the intent of the M.P.S. by not requiring specific details concerning a rezoning application. The Board has made such determinations in the past.

Certainly this was the case in Kingston Aluminum Products v. Town of Truro, (1989) 8-B M.B.D. 267. In their brief the Appellants quote the following from page 275 of that decision:

> "In this case Council did not have "sufficient knowledge of the applicant's proposal" and could not determine whether there were controls to reduce conflict. Without a specific proposal Council could not properly assess the criterion set out in Policy 501".

The circumstances in the Kingston Aluminum appeal are considerably different than the current appeal. In Kingston Aluminum the subject land, to which the rezoning application applied, directly abutted the Appellant's existing land and business. It also directly abutted the back yards of the neighbours adjacent to the existing business. There was nothing between the properties. This is not the case in the current appeal.

In Kingston Aluminum the Applicant (Appellant) was the owner and the developer. As such he had direct control over the use to be put to the land subject to the proposed rezoning. There was an ability to indicate to Council the specifics of any plans that may have been made for the development of the land.

Council was also aware that there was a real probability of a significant effect on directly abutting properties depending on the extent of the development.

In the Wallace appeal, Mr. Wallace was the expected developer of the subject property. It was reasonable to expect that Mr. Wallace should have been able to provide some indication of his plans or intentions for the property.

In the current appeal, Mr. Purdy, the Applicant, is the owner of the land and has stated that he is not the developer of the property. He has agreed with Council to place restrictions on future development on his land in the form of the covenant agreement. These covenants provided the basis on which Council considered certain aspects of Policy 501.

Peter Nelson, in his report to Council of May 29, 1989, included, as part of this Report, his recommendations of February 18, 1986. In the 1986 Report Mr. Nelson reviewed all criteria of Policy 501 in detail. Both of these reports and the comments of Mr. Richards and Mr. MacNeil concerning Policy 501 were before Council to consider during their deliberations. The Board does not propose to repeat all those comments in this decision. The Board will only discuss those criteria on which concerns were raised.

As previously mentioned, Policy 501 sets out the criteria that Council shall consider when amending a zoning by-law. The Appellants argue that Council did not give due regard to certain criteria contained in this policy.

The Appellants questioned the adequacy of recreation facilities in the area of the proposed rezoning. Recreation must be considered as part of criteria 501(b)(iii).

The M.P.S. contains a Section entitled "Recreational" under Land Use Policies. This Section indicates a definite intention of the policies of the M.P.S. to support recreational uses within the Town of Truro (Policies 259 to 269). The policies within this Section make frequent reference to the Parks and Recreation Commission formed for the Town of Truro. Its policies also contain direct reference to Victoria Park (Policies 265 and 266). Additional recreational facilities are needed for the residents in all of South Truro. Truro Parks and Recreation Commission has developed a master plan which was submitted to Council in the summer of 1989. This plan addressed the recreational needs of the residents of South Truro. This plan has not yet been adopted by Council nor is it required to do so.

The subject property is directly adjacent to Victoria Park which is a large park in the centre of town, available for the use of all residents of Truro. Access to the park can be obtained from downtown Truro or from an extension of Fairview Drive. Fairview Drive is located one block north of the northern boundary of the subject property. The whole of the eastern boundary of the subject property is directly adjacent to Victoria Park. There is no other developable land between it and the park.

The Board also notes that the developer of the subject property would be required to provide some recreational facilities for the residents of the apartment buildings as they are developed.

This is required by Section 8.5(d) of the Land Use By-law (L.U.B.) for the Town of Truro.

Council was aware of the recreational situation existing in the area of the proposed rezoning. It has the whole matter of recreation for South Truro under current consideration. The Board does not believe the intent of the wording of the M.P.S.'s various recreational policies and preambles indicate that all recreational facilities must be in place prior to a change in the L.U.B. In any case, the proposed amendment meets the recreational criteria of Policy 501(b)(iii) for recreational facilities by virtue of its proximity to Victoria Park and by the provision of its own internal facilities as required by 8(5)(d) of the L.U.B..

The Board is of the opinion that the proposed rezoning is not premature or inappropriate by reason of the adequacy of recreational facilities.

The Appellants questioned the adequacy of road networks as referred to in Policy 501(b)(iv). A letter dated February 24, 1986, from the Chief of Police, A. L. Murray, who is the Traffic Authority for the Town of Truro, was included in Council's information. He stated that he did not foresee any traffic problems arising from traffic entering and exiting the driveways. He did state that future consideration must be given to the widening of Young Street for any future subdivision in the area. Mr. Nelson reported to Council and T.P.A.C. that the Chief of Police was still of the same opinion. The Board is aware that the arterial road structure of the south Truro area is currently under review by the Traffic Authority and Council. Various witnesses expressed concern about the current traffic flow and the possible increased traffic flow on Young Street caused by the development. Specific traffic studies were not presented by any of the parties.

The Board is of the opinion, based on the evidence before it and Council, that the proposed amendment is not premature or inappropriate by reason of the adequacy of road networks.

The Appellants also expressed environmental concerns as referred to in Policy 501(b)(v), c(ii) and (d). Here again the matter was before Council for consideration in the form of a letter from Glen A. Warner, Environmental Technologist of the Department of Environment for the Province of Nova Scotia, dated June 13, 1989. Also there was a letter dated January 27, 1986, from M.H. MacGill, Town Engineer for the Town of Truro. Mr. Nelson also reported that Mr. MacGill saw no change in his opinion for the current application. There is nothing in the content of either of these letters that would give Council or the Board any indication that major problems might occur in relation to the proposed rezoning. There was nothing to cause Council to seek further detailed information as to the possible environmental effect of development on the site.

Section 4, General Provision for All Zones, and Section 8, Residential Zone Requirements of the L.U.B. contain specific criteria relating to an R-3 Zone development. These criteria must be met in order to proceed with development and obtain a building permit. Additional information may be required from officials of various departments of the Province of Nova Scotia in order to satisfy some of these criteria.

The Appellants introduced no specific evidence that there was potential environmental damage from the proposed rezoning.

In light of the content of the two letters it is the Board's opinion that Council was not inconsistent with the intent of the M.P.S. by relying on the L.U.B. to insure appropriate environmental controls are in place.

The objections of Mr. MacNeil on behalf of the Glenwood Homeowners Association obviously, were of some concern to Council and the P.A.C. This concern is reflected in the Council Minutes by the Chairman of T.P.A.C., Councillor Wheelock. This concern dealt with Policy 211 as it related to a sense of security. It also included the criteria relating to the reduction of conflict and potential incompatibility with adjacent land as contained in Policy 501(c) and (e). In recognition of these concerns, the Town entered into the covenant agreement.

As previously quoted, from Wallace "a rezoning application is based to a certain extent on trust". Acting on the advice of the Town Solicitor, Council agreed to the terms of the covenant agreement. By agreeing to the terms of the agreement Mr. Purdy obviously gave Council a sense of "trust" that the property would be developed in an appropriate manner. Mr. Purdy owns a considerable amount of land to the south of the subject property and is a resident of the area. It is to his advantage to ensure that the land is developed in an appropriate manner.

The Appellants argue that many of the terms of the covenant are "motherhood" and would be required by the provisions of the L.U.B. or as a matter of course in order to make the units marketable. Council felt they went further.

By agreeing to, and insisting on the terms of the covenants, Council was satisifed that the agreement addressed the issue of a sense of security and provided sufficient controls to reduce conflict and potential incompatibility with adjacent land uses. Thereby, in part, alleviating some of the concerns expressed by the residents of the area at the P.A.C. and Council hearing.

The Board has reviewed the policies of the M.P.S. and is satisfied that all the relevant policies were before Council in one form or another for consideration. The Board is also satisfied that Council was aware of the significant areas of the Board's previous decisions contained in Benedict and Wallace during their deliberations.

The significant point of the Benedict decision was that Council could not pass its responsibility for review of the specific policies and criteria of the M.P.S. to the Planner but had to carry out such review in its own right. There is no question that Council carried out its own review in the current situation. Other specific points of the Benedict decision have been discussed previously in this decision.

In the final paragraph of the Wallace decision at page 328, the Board stated:

> "The Board's role is not to impose its own view but to determine whether or not Council's decision was reasonably

> consistent with the intent of the M.P.S. While there are policies in the M.P.S. that encourage residential development, Council is not bound to grant all applications for rezonings for residential use. Council has a discretion which it must exercise reasonably in the context of the M.P.S."

The Board is still of the opinion that its "role is not to impose its own view but to determine whether or not Council's decision was reasonably consistent with the intent of the M.P.S.". The Board agrees that "Council is not bound to grant all applications..." but has a "discretion which it must exercise reasonably". The Board went on to state in Wallace that Council's decision to refuse the requested amendment was consistent with the M.P.S.

The Board is of the opinion that in the current application for amendment there are sufficient differences in this application and Council's review thereof for the Board to still determine that Council's decision to approve the requested amendment is still reasonably consistent with the intent of the M.P.S.

These differences would include the following:

- need or demand for apartments was different;
- recreational considerations were addressed in more detail and were considered by Council and the Board;
- certain aspects of the worst case scenario were considered;
- the sense of security issue was specifically addressed by Council;
- a proposal, acceptable to Council, was presented in the

form of the covenant agreement.

Council still "has a discretion which it must exercise reasonably in the context of the M.P.S.". The Board is of the opinion that Council has exercised this discretion reasonably.

Prior to considering the covenant agreement the Board wishes to comment on an argument raised by the interested parties, in the Wallace decision. This argument was stated at page 324:

> "...the Council and the Board should indicate "that the large number of applications is a factor" that has led to the decision to refuse the rezoning and that to do otherwise sends a message "that a persistent developer can wear down and whittle away the zoning and planning protections which the residents perceived they enjoyed"."

This point was again argued by the Appellants in this appeal. The Board feels that it would be useful to a better understanding if the final part of that paragraph were also included in the quote. It states:

> "In the Board's opinion there is no mechanism present which would prevent a developer from reapplying. One anticipates that any subsequent application following a refusal will incorporate features that will make a proposal more acceptable to the residents."

In this appeal, in fact, a reapplication concerning the same land, has occurred. Council obviously felt that there were sufficient differences in the application and its consideration thereof to approve the amendment within the intent of the M.P.S.

Here again the Board points out that it cannot allow the appeal unless it determines that Council's decision cannot reasonably be said to carry out the intent of the M.P.S. Land Use By-law and planning protection are all part of an M.P.S. and can only be changed by formal amendment and not by persistent applications.

It is the Board's opinion the covenant agreement was an integral part of Council's considerations. The amendment would not have taken place without it. One of the destinguishing features of this appeal from Benedict and Wallace is the use of a covenant agreement.

Therefore it is necessary for the Board to consider the agreement and the manner in which it was used for this application.

All three parties referred to Re: Harrietsfield - Grand Lake Community Association and the Municipality of the County of Halifax (1978) 87 D.L.R. (3d) 208 in their briefs.

The Board has considered the arguments presented by the parties and read the Harrietsfield decision.

MacKeigan C.J.N.S. developed his portion of the decision as follows:

> "The respondent municipality has attempted by a combination of by-law and contract to spot rezone the property...". (p. 209)
>
> "The municipality, like all statutory corporations can exercise its powers only by by-law unless otherwise authorized by statute or charter". (p. 210)
>
> "The enabling legislation here confers on the municipality no pwers to exercise its legislative powers otherwise than by by-law...nor does it contain any provision authorizing contract amendments or conditions to be added to a Zoning By-law". (p. 211)

He goes on to say that certain sections:

> "...of the Planning Act permit approval by resolution of specific developments and approval of development agreements with developers. They apply, however, only after a municipal development plan has been adopted and a

> general zoning by-law to carry out the plan has been passed..." (p. 211)

In allowing the appeal he concludes with the following comment at page 213:

> "This contract therefore cannot qualify as a by-law, either in form or in substance. I must conclude that the contract was not a valid by-law, that the attempt to create the new zone by a combination of by-law and contract was ineffective and ultra vires the municipality and that the indivisible resolution amending the zoning by-law and approving the contract was an ultra vires act and should be declared void. The part of the resolution changing the zone from R-2 to C-1 is itself of doubtful legality since no amending by-law was apparently passed. It is, however, an inseparable part of one legislative act which is invalidated as a whole by the illegal attempt to exercise legislative power by contract."

Coffin J.A. allowed the appeal in accordance with the reasons of the Chief Justice. At page 213 he states:

> "I am in agreement with my brother Cooper that the Municipality has power to amend its zoning by-law. My difficulty arises when the amendment so passed is modified or restricted by separate agreement".

Later, on the same page, he states that he is in agreement with the Chief Justice that the Sections of the Planning Act which permit

> "approval by resolution of specific development and development agreements apply only after a municipal development plan has been adopted and the zoning by-law passed."

Cooper J.A., in his dissent, discussed at some length the nature of covenants that would be enforceable against the land. The other judges did not disagree with this discussion but they had both determined that covenants could not apply.

The Board believes that what Harrietsfield is saying, in essence, is that rezoning is a legislative function not preformable partly by contract. Where an agreement is considered necessary for development it must be carried out under the terms and conditions of an M.P.S. when one is in place.

In Vaughne Realty v. Town of Yarmouth (1989) 8-B M.B.D. 471 the Board briefly dealt with this same area of covenants. At p. 517 it states:

> "There has been a suggestion of a restrictive covenant to ensure this result. A restrictive covenant would not be applicable since the Town could not take it."

This statement was not supported by authorities at this point and was not discussed at any length in the decision.

Counsel for the Town and Mr. Purdy submit that the circumstances relative to what Council did in this instance were considerably different from what was done in Harrietsfield. Such differences would include:

- Harrietsfield was decided under a former Planning Act. A new Act is in place.

- There was no Municipal Development Plan in effect for Harrietsfield. There is an M.P.S. now.

- The affect of Harrietsfield was to create a new zone. That did not occur presently.

The Board does not disagree that there are differences between the two situations. Regardless of these differences the underlying reasons expressed by MacKeigan, C.J.N.S. and Coffin, J.A. in the decision would appear, to the Board, to still apply.

In the circumstances of the current appeal the use of the covenant agreement was an attempt to exercise legislative power by contract. Council has rezoned a property by by-law amendment and contract.

The Board is not aware of any other statute or charter which would permit the Town to act in a manner other than by by-law.

Truro does have an M.P.S. which has provision for development agreements. These provisions are not available in the part of Town in which the subject property is located.

The nature of the covenants themselves show they are not separate from the rezoning powers or, in any real sense, voluntary. The wording makes them contingent upon the rezoning and its continuance. The by-law amendment and the covenant agreement are not severable. One cannot use a covenant to achieve a development agreement where one is not available.

The Board's understanding of Harrietsfield suggests that Council's action cannot be done. An agreement must be entered into under the terms and conditions provided in the M.P.S. The M.P.S. provides no authority to enter into an agreement such as Council did in this case.

Based on its understanding of the judges' rulings in Harrietsfield, the Board is of the opinion that Council's reliance on the covenant agreement as part of the by-law amendment process was not within the intent of the M.P.S.

Therefore the decision of Council cannot reasonably be said to carry out the intent of the M.P.S.

As provided by Section 70(5)(c) (formerly 63(4)(c)) of the

Planning Act the Board allows the appeal and reverses the decision of Council amending the Land Use By-law.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 23rd day of May, A.D., 1990.

MICHAEL G. JOHNSON,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

CROWELL v. SHELBURNE COUNTY

PLANNING - SUBDIVISION - REFUSAL - SEWAGE SYSTEM - PLANNING ACT S. 96, 115(4) SUBDIVISION REGULATIONS S. 7, 9, HEALTH ACT, S. 2, 38(1), MUNICIPAL BOARD ACT, S. 21, 25.

D.C. & R.C. owned 2 acres of land and wished to convey Lot 1 to their son R.C. There are two "cottages" on the property. R.C. earlier received a holding tank permit and building permit and constructed a cottage on Lot 1. Assessor had separately assessed R.C. for Lot 1. Lot 1 contains less than 20,000 sq. ft. Department of Health refused approval because lot didn't meet minimum size.

HELD: Appeal Allowed.

Regardless of the result of this appeal, there will be no more intensive use of the land in question. If a person seeks subdivision and is legally entitled to it, the Development Officer must approve it. He has little or no discretion. The Board has determined that the Appellant was entitled to the subdivision applied for.

The system is a "private sewage disposal system". Is that the same as an "on-site sewage disposal system"? the ordinary meaning of the words "on-site sewage disposal" means the residue of the process of the sewage system installed would be discharged on or under the surface of the lot. A holding tank system, as permitted and installed, contemplates the residue of the process would be confined on the site separate from the earth. The Board has no jurisdiction to review the actions of any Health Inspector.

NOTE: Decision reversed on appeal to N.S.C.A.- S.C.A. No. 02330

NSMB-6-90-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, R.S.N.S. 1989, c. 346, as amended, by ROGERS E. CROWELL [DONALD N. CROWELL and RUTH B. CROWELL] from a decision of RIDGE HILTZ, a Provincial Development Officer, made March 9, 1990, which refused Mr. Crowell's application for final subdivision approval for Lot 1 and remainder lands, located at Clyde River, Shelburne County.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: ROGERS E. CROWELL, on behalf of himself and Donald M. Crowell, Appellant;

WILLIAM M. WILSON, LL.B., on behalf of the Provincial Development Officer, Ridge Hiltz.

HEARING DATE: May 24, 1990.

VIEW OF SITE: May 24, 1990.

DECISION DATE: JULY 6, 1990.

DECISION: Appeal Allowed.

DECISION

INTRODUCTION

This is an appeal under the Planning Act R.S.N.S. 1989, c. 346. DONALD N. CROWELL on behalf of himself and the other landowner, his Wife, RUTH B. CROWELL, filed an application to subdivide certain lands at Clyde River, Lunenburg County in he District of Barrington. His application was received February 14, 1990 and was completed February 19, 1990.

His application was made under the Provicial Subdivision Regulations ("Regulations") and was turned down by a Provincial Development Officer, RIDGE HILTZ on March 8, 1990.

After at least one false start (which will be dealt with under the heading of Preliminary Matters later in this decision) one ROGERS CROWELL filed a Notice of Appeal, dated March 16, 1990, appealing Mr. Hiltz's decision with the Board. The Board processed this Notice of Appeal which culminated in this hearing.

PRELIMINARY MATTERS:

There are preliminary matters which the Board now will deal with.

The Municipal Board Act, R.S.N.S. 1989 c. 297, Section 25, (1) and (2) read as follows:

> "(1) Notice of any hearing shall be given by advertisement in one or more newspaper circulating in the municipality affected by the subject-matter of the hearing for three consecutive weekly insertions preceding the date of the hearing unless otherwise ordered by the Board.
>
> (2) The Clerk shall be responsible for inserting such advertisements and shall recover the actual cost thereof from the person initiating the application, appeal or other matter or proceeding before the Board."

No one at the commencement of the hearing was able to produce the tear sheets showing that this Section of the Municipal Board Act had been followed. There was no evidence proven to move the Board to "otherwise order".

Rogers Crowell testified that he had seen the advertisement on at least one occasion.

Mr. Wilson, acting for the Development Officer, said he had no knowledge of the advertisement. How then can the Board satisfy itself that Section 25 of the Municipal Board Act has been complied with?

At the hearing, the Board instructed the Clerk to follow up and obtain the necessary newspaper tear sheets. At the hearing, the Board reserved a space to file the tear sheets in evidence, namely Exhibit C-12 should they exist. At the hearing, the Board said it would not complete this decision until it was satisfied that Section 25(1) of the Municipal Board Act has been met. The Board must satisfy itself a newspaper published the Notice of Hearing (in one or more newspapers circulating in the municipality affected) for three consecutive weekly insertions preceeding the date of the hearing.

Since you are seeing this decision it is clear that the newspaper did publish on time and that the tear sheets proving this are now an Exhibit, C-12.

Mr. Wilson, for the Development Officer, raised the very pertinent point that the Application for Subdivision was made by Donald N. Crowell on behalf of himself and Ruth W. Crowell, the other landowner. While the Notice of Appeal purported to be from Rogers Crowell. Mr. Wilson noted Section 115(1) of the Planning Act:

> "Where a development officer refuses to approve a plan or an instrument of subdivision, the applicant therefor may appeal the decision to the Board."

Mr. Wilson pointed out that Rogers Crowell was not an applicant and that the Applicant Donald Crowell had not signed the Notice of Appeal, nor was he described in it as an Appellant. The Board heard argument from Rogers Crowell. He contended that he was acting on behalf of his father (Donald Crowell) and himself on all occasions.

The Board reserved its decision after this argument so that it could hear evidence on the matter. The Board proceeded with the hearing subject to its subsequent ruling on whether or not the "applicant" had appealed the decision of the Development Officer. [During the argument, Mr. Wilson conceded to the Board that if his motion succeeded the very same issues could be raised by the applicant re-applying for subdivision, getting a refusal decision again and then appealing under the proper signatures.]

During the course of the rest of the hearing, the Board heard evidence pertinent to this point. While testifying, Rogers Crowell testified to the substance of his argument. He said he was acting on all occasions on behalf of himself as well as on behalf of his father. Mr. Crowell, Senior, testified that his son was acting "sort of as his agent".

The Board notes that while the refusal was to Donald and Ruth Crowell's application, the correspondence was sent by letter of March 9, 1990, by the Development Officer to "Roger E. Crowell" telling him he had a right to appeal. On March 26, 1990, the

Development Officer wrote the Board concerning "Mr. Roger Crowell's" appeal. The Development Officer did not take that opportunity to correct the Board and specify who was the applicant. The Board concludes the Development Officer (who should have known any difference) saw no difference between Rogers Crowell and his father. The Board can only assume that Rogers Crowell, throughout, was acting as an agent, if not for his father and mother, at least for his father. His father was one of the applicants. The Board is able to find that in these circumstances the appeal signed by Rogers Crowell was an appeal signed by an agent of the applicant Donald Crowell. His signature was the act of the applicant. Therefore one of the applicants has appealed the Development Officer's decision to the Board.

JURISDICTIONAL FINDING

All other matters necessary to the jurisdiction of the Board have been proven to the satisfaction of the Board. No one took objection to the Board's jurisdiction to hear the appeal. The Board therefore finds on the facts that the Board had jurisdiction to hear the appeal.

GENERAL PROCEDURE

Under Section 16(1) of the Municipal Board Act, the Chairman assigned Board Member, Richard L. Weldon to hear the appeal.

The Board heard the appeal agreeably to its Notice of

Hearing at its May 25th, 1990 sittings. The sittings occurred at the Council Chambers, Municipality of the District of Barrington, Barrington Passage.

Section 21(2) of the Municipal Board Act says:

> "Every municipality, and every board, commission, committee or agency thereof, shall furnish to the Board such accounts, reports and information as the Board requests."

This Section does not directly respond to needs when the person being appealed does not fit within the Section.

In this case, the person is a Provincial Development Officer. The Board in that case, however, tries to engender the early production of information under Rule 17(5) of its Rules:

> "In the case of an appeal from a decision of the Provincial Director or Provincial Development Officer, the appeal record shall be prepared and filed by the Provincial Director of Planning or the Provincial Development Officer who made the decision."

The Appeal Record in this case was filed.

The Board notes that in an ordinary appeal (Rule 17(1)(a)) requires that the municipal clerk: "file with the Clerk, two copies of an Appeal Record and one copy of the relevant Municipal Planning Strategy, Land Use By-law...". Section 39(1) of the Municipal Board Act requires that any information filed with the Board with an intent to influence the Board's decision be provided to all parties to the appeal.

In this particular case, the Provincial Development Officer did not file with the Clerk either the Municipal Planning Strategy (M.P.S.) or the Land Use By-law (L.U.B.). He did file the Regulations. During the hearing, counsel for the Development Officer was pleased to produce those but only at the request of the Board. The Board cannot say he was legally incorrect in doing so at that late time given the wording of Section 21(2)of the Municipal Board Act. In this case (where he was relying on the L.U.B. to support some of his positions and the L.U.B. relates to the M.P.S.), perhaps both could have been produced in advance much as a municipality would provide them in advance.

Production of these documents in advance should reduce the surprise to the other parties, assuming they had not previously had access to the documents and they are capable of understanding the documents. Early production of documents allows the Board to prepare to identify the issues. This has particular importance in a case where the Appellant, not represented by counsel, is not skilled in planning appeals and is at odds with a departmental official supported by government-paid counsel. In those cases, the Board almost has to act in a paternalistic mode to make sure that the total case of the Appellant is at least exposed on the record to the extent that the Appellant wishes to expose it. This may appear to be unfair to the responding municipality or Development Officer. It is an attempt by the Board to further the fair and complete hearing of appropriate appeals conducted by unrepresented (and possibly unsophisticated) Appellants. Courtesy encourages the Development Officer to provide all the underlying documents upon which he is relying.

The Board further notes that the copies provided of the

L.U.B., the M.P.S. and the subdivision regulations may only become admissible under the provisions of the Evidence Act being c. 154, R.S.N.S. 1989. The full title of this Act perhaps is useful in this case. It is an "Act Respecting Witnesses and Evidence". Various Sections of the Act apply here. Section 2(b):

> ""court" includes any person having by law or consent of parties authority to receive evidence."

The Board fits within this category. Section 6:

> "Evidence of any proclamation, order, regulation or appointment made or issued by the Lieutenant Governor, by the Governor in Council of the Province, by the lieutenant governor or governor in council of any of the provinces or territories of Canada or by or under the authority of any members of the executive council, being the heard of any department of the government of such province or territory may be given in any court of justice in the Province, and in all or any legal proceedings of any kind in the Province in any one of the modes hereinafter mentioned.
>
> (a) by the production of a copy of such proclamation, order, regulation or appointment, purporting to be printed by the Queen's Printer of the Province or by the government printer for the province or territory;"

The Regulations that were presented here were clearly an office cosolidation. The Board is unable to determine, from the texts of the documents produced, whether the Regulations were admissible under Section 11 of the Evidence Act.

> "Notwithstanding anything in this Act, every proclamation and every order made or issued by the Governor General or the Governor General in Council or by the Lieutenant Governor or the Lieutenant Governor in Council, and every publication thereof in the Canada Gazette and in the Royal Gazette, shall be judicially noticed by all courts, judges, justices of the peace and others."

No objection was taken to the admissability of the

Regulations or the L.U.B. or the M.P.S. Had objection been taken, the documents are prima facie inadmissible in the form tendered. They are strictly admissible only under the statutory authority above cited.

In this particular case no objection was taken to their admissibility. It was clear that all parties concerned used the same documents. The Board therefore reluctantly admits the Regulations as tendered, the L.U.B. as tendered, and the M.P.S. as tendered. The Board brings this to the attention of all parties concerned. The Board does understand the formalities of proof. It does not want this case to be taken as a precedent on admissibility of inappropriate documents. Lack of formality in proof is not endorsed by this Board.

FACTS

The facts in this case are not really in dispute. On the west side of the Clyde River between it and the Upper Clyde River Road, Donald N. and Ruth W. Crowell own about 2 acres of land. They wish to give the southern 1/2 acre of land to one of their sons, Rogers Crowell. In order to effect this, they hired the D.S. Thorne Survey Associates, Nova Scotia Land Surveyors, to prepare a plan of subdivision of the 1/2 acre lot. Thorne's did this on a plan dated August 28, 1989. This final plan of subdivision showed "Lot 1", the 1/2 acre lot and the "remainder lands" (1 1/2 acre).

This plan is Exhibit C-13. The Clyde River runs south to the ocean. The Upper Clyde River Road runs roughly parallel to this River. The Lot 1 mentioned is to the south of the shed on the remainder lands of Donald N. and Ruth W. Crowell shown on the plan. It has a north boundary running roughly east and west from the river to the road about 142 feet. It has an irregular river frontage of about 227 feet more or less with 219.67 feet in a straight line between its north east corner and its south east corner. The southern boundary running from the road is approximately 44 feet long and the road frontage is approximately 217.17 feet.

The Board viewed the site on the day of the hearing after the conclusion of the evidence and argument accompanied by Rogers Crowell and Donald Crowell.

On Lot 1, the Board found currently located a storey-and one-half "cottage" set on a concrete block wall. There was one shed apparent on the property and several vehicles. The "cottage" looked lived in at this time of year [May 24, 1990].

There was a shed on the south end of the remainder lands. There is a fence at each end of this property. The shed on the remainder lands was clearly a recreational type shed surrounded by canoes. The cottage on the remainder lands of Donald and Ruth Crowell appeared to be a less permanent establishment than the "cottage" on Lot 1. Towards the very north of the remainder lands of Donald and Ruth Crowell was a camper-trailer. This camper-trailer was apparently unoccupied at the present. It appeared suitable for recreational residential occupation. Both sites were cleared. The road frontage of the two-acre block is frontage on a public road, gravel surfaced, well shouldered and ditched.

The plan shows Lot 1 as containing 19,886 sq. ft. more or less. Lot 1 has a very irregular east boundary along the Clyde River. This irregular boundary makes it rather difficult to compute the actual square footage of the land encompassed within the boundaries of the lot. The surveyor calculated the land area of Lot 1 as 19,886 sq. feet more or less. The surveyor calculated the remainder lands of Donald and Ruth Crowell lying to the north of this as 1.5 acres more or less.

Rogers Crowell said he applied for a building permit for his "cottage" before applying for the subdivision and was turned down. He was turned down by the Municipal Development Officer. The lot would not sustain an on-site sewer disposal system so close to the river.

Mr. Crowell then applied for a holding tank permit as a method of disposing of sewage. He received a Department of Health permit to build a holding tank. He received a building permit to construct his "cottage". The Assessor has separately assessed Rogers Crowell for several years for this lot. Mr. Crowell built the "cottage". The Assessor assessed to him the lot and cottage at $14,000.00 or $15,000.00 value. Rogers Crowell has installed the sewage holding tank and built a shed.

Donald Crowell said he is not interested in increasing the square footage of Rogers Crowell's leased lot. Any increase in Lot 1 would interfere with the shed Donald Crowell has on his property and his water frontage. In Donald Crowell's phrase, the necessary square footage to bring Lot 1 up to the claimed standard "would come right up to his cottage and take in his cottage". Mr. Crowell, Senior, has suggested that he could attain the same objective of giving a title to his son by Will.

Rogers Crowell obviously has a significant investment in his property at present. He wishes a separate deed for his property now. He only has a lease, at present. Rogers Crowell initiated this subdivision application in an attempt to obtain a right to an immediate conveyance to him of Lot 1.

Mr. Hiltz said that on this particular application he might be willing to approve the application if the Department of Health would grant its approval, and if the lot contained 20,000 square feet or more. Mr. Hiltz says Lot 1 does not comply with the Regulations. It is not the 40,000 square feet per lot required by Regulation 7(1) of the Regulations. (Schedule "C" - 40,000 square feet near a watercourse.) He said he could consider approving the application under Regulation 7(2) if an authorized person of the Department of Health would approve the lot for on-site sewage disposal purposes. Mr. Hiltz also noted that Regulation 8 may apply were a L.U.B. is in effect. There is a L.U.B. applying in the area.

Mr. Hiltz does not know what zone the property lies in. He feels that the L.U.B. requires (according to his information given him from the Development Officer of the Municipality) a minimum of 20,000 square feet per lot. Mr. Hiltz says that he is not sure what the plus or minus means on the subdivision plan. Lot 1 may, or may not, be over, under or at 20,000 square feet.

The Board looks at the M.P.S. It finds that map 6 of the Generalized Future Land Use Map (G.FLUM) lists "Rural Mixed Development", "Rural Center" and "Industrial Marine" and "Environmental Stress" designations. According to G.FLUM, the Board deduces (since the property was not pointed out to it on a zoning map) that the land falls within the Rural Mixed Development designation.

> The M.P.S. policies applicable seem to be this: A(3)
>
> "It shall be the intent of Council to initially guide the location of future development in the rural area of the municipality by establishing a rural mixed development base ....on the generalized future land use map 6 to accommodate a wide range of land use activities (refer to policy B-8).

Policy B-8 says:

> "Within the rural mixed development designation shown on map 6, it shall be the intention of Council to divide future development by establishing a rural mixed development RM-1 zone in the Land Use By-law to accommodate a wide range of land use activities."

Policy B-9 says:

> "It shall be the intention of Council to zone as rural mixed development RM-1 all lands within the rural mixed development designation and to permit such uses as new low-density residential dwelling units including senior citizens housing, mobile homes and mobile home parks, dwelling conversions, institutional uses, agricultural uses, forestry activities, as well as commercial and industrial uses, including existing fish reduction plants identified in Schedule "F" of the Land Use By-law except as new fish reduction plants.

It seems then that it is the intent of the M.P.S. that all this land be zoned Rural Mixed Development, RM-1.

Part 10 of the L.U.B. (applying the M.P.S.'s policy) includes these permitted uses in the RM-1 zone: "cottages, ...single family detached dwellings". Part 10 number (2) requires the lot size to be minimum lot area 20,000 square feet, minimum lot frontage 100 feet, minimum front yard 25 feet, minimum rear yard 25 feet. Note "the Department of Health may require Lot sizes greater than those listed here for on-site sewage disposal purposes".

The Department of Health has decided that this land is not suitable for on-site sewage disposal purposes. It has required a holding tank. This is a method of disposing of sewage not on-site. The sewage is trapped in a tank and then transported, not through a piping system, elsewhere for eventual disposal.

There will be no increase in the lot size voluntarily given. Donald Crowell has said that there will be no possibility of a sewage disposal system other than that which is already installed. The holding tank system on site is basically an on-site storage and carry away system for sewage disposal.

Rogers Crowell received a building permit and is now using the property to its fullest use. Thus if the subdivision approval is not granted, Rogers Crowell will be able to continue his use of the land. There will likely be no possible planning reprecussions either to him or to his father and mother. They will continue to use the property just as it is being used now.

The question then boils down to the legality of change of ownership (alienation) as being the sole underlying reason for seeking subdivision approval.

> Part 16 at page 30 of the L.U.B. says:
>
> "No person shall erect more than one main building on one lot except for
>
> b) non-residential buildings located in a rural mixed development RM-1 zone; mobile homes and mobile home parks and rural mixed development or residential general R-1 zone."
>
> Section 14 defines "cottage" as follows:
>
> "cottage" or "cabin" means a dwelling intended or used for not more than one family and designed and built for seasonal or periodic occupancy rather than for permanent year-round use by reason of its light frame construction or lack of basement or concrete slab foundation or lack of furnace or other facility suitable for winter heating or lack of plaster or other finish or interior walls or ceilings."

Thus the 2 acres bulk of land containing Lot 1 is the site for a residential trailer and two "cottages". These are all residential uses.

ARGUMENTS

The Appellant Rogers Crowell and his father both made what amounted to arguments. These arguments said, basically, "I want to give the land to my son and I should be able to do so". Mr. Rogers Crowell argued "I have land I have invested in and I have been assessed for, I want to be able to get a deed to it, nothing else remains to be done". These lines of argument, while understandable, are not helpful to the Board in its duties under the Planning Act.

Mr. Wilson's arguments may be summarized as follows:

1. There is little chance of the parties reaching a mutual solution by negotiation, and therefore a an adjournment to allow negotiations towards a settlement would likely fail. He did not support the Board's suggestion that an adjournment be granted to allow the parties to negotiate.

2. If the Department of Health changed its mind as to the suitability of the proposed lot for on-site sewer services, Mr. Hiltz might reconsider his refusal to allow the subdivision. Mr. Wilson did not push this argument as there are many other variables that might enter into the subdivision approval.

3. Even if the Department of Health changed its mind, Mr. Hiltz could not approve the subdivision because the proposed Lot 1 would contain an area of less than 20,000 square feet required by the applicable Municipal L.U.B.

4. In any event, the Board was extremely limited in its powers since it could only act under Section 115 (4) and (5) of the Planning Act.

These arguments of Mr. Wilson, coupled with the wishes of the Appellants, serve to define the issues the Board must determine.

The Board has not found a previous decision of the Board dealing with the refusal of a Provincial Development Officer of an application to subdivide under the Regulations. It will therefore be useful to trace the statutory [regulatory] framework which surrounds the handling of subdivision applications by Provincial Development Officers under the Planning Act.

LEGAL FRAMEWORK UNDERPINNING PROVINCIAL SUBDIVISION APPLICATIONS

Subdivision of land prior to the Planning Act was freely and commonly done by landowners by deed, plan, will or any other method the landowner could devise. See Kent Homes Limited v. Meadowland Development Limited 65 N.S.R. (2d) 352 most recently followed in David Walsh v. The Town of Bedford and Barry Zwicker 1990 S.H. No. 71201 (unreported). This freedom to subdivide and then to convey is now somewhat restricted by various sections of the Planning Act which make it nearly impossible legally to convey portions of land severed from another piece without first receiving subdivision approval. See sections 110(1), and 111(1) and (2) of the Planning Act.

There are social (or public policy) reasons which support these restrictions imposed on landowners by the Planning Act. The Board will list a few:

1. The subdivision process rationalizes in many cases the definition of real estate boundaries;

2. The subdivision process supports the health needs of the inhabitants of land by trying to ensure there is enough land available to serve the purpose for which it is to be used;

3. The subdivision process forms one of the bases of the purposes of the Planning Act set out in its section 2.

Subdivision process is thus a must for landowners who wish to convey only a part of their previously unsubdivided land.

The Planning Act contemplates that the supervision of subdivision of land be under municipal control of the municipality in which the land lies. See sections 95(1)(a), 98(1), 98(2), 98(3) of the Planning Act.

In order to ensure there is supervision of subdivision of land in the province where the municipality has not regulated the subdivision process, the Minister has a duty to provide subdivision regulations. Section 96(1) of the Planning Act.

The Regulations should now apply to certain municipalities in the province (Section 96(4) of the Planning Act) including the present municipality.

Provincial Subdivision Regulations for the Municipalities of the District of Chester et al [Exhibit C-9] lists on its title page the present municipality. On page 1 it says:

"PART 1: TITLE

1. These regulations may be cited as the "Provincial Subdivision Regulations" for the Municipalities listed on the cover."

Although this section doesn't say so with precision (cited as...for" does not necessarily mean "applies to"), the Board takes this section to mean that these Regulations apply to the instant municipality.

Section 96(4) of the Planning Act tends to support the Board's finding here. The Province does have the power to designate certain areas subject to the Regulations. The fact that it has passed Regulations listing certain municipalities and that the instant municipality is amongst those listed tends to give the Board's view support.

According to these Regulations at p. 2:

"3(j) Subdivision means the division of any area of land into two or more parcels, and includes a resubdivision or a consolidation of two or more parcels."

This definition of "subdivision" in the Regulations mirrors the definition of subdivision contained in Section 3(r) of the Planning Act. The subdivider/applicant/Appellant here is attempting to subdivide one piece of land into two pieces. The smaller piece (Lot 1) he wishes the Provincial Development Officer to stamp "Approved".

There are various regulatory requirements which apply to the present subdivision application which the application meets. All parties active before the Board agree this is so. The Board will not deal with those requirements in any detail.

The following excerpts from the Regulations are arguably applicable to the present application. To the extent they are applicable, they may have a determinative effect on the outcome of the appeal.

At p. 3 of the Regulations, they commence:

"7(1) All lots shall meet the requirements for minimum lot area and lot frontage minimum contained in Schedule "C" of these regulations.

[Schedule "C" at p...... has this table]

TYPE OF LOT	FRONTAGE	AREA
Lot not serviced by Public Water and sewer services	...	1858 metres square (20,000 square feet) having dimensions that would permit the lot contain a 30 metre (98.42 feet) diameter [sic] circle within boundaries.

NOTE 1: A lot of this type, any part of which is within 22 metres (72.17 feet) of a watercourse requires a minimum area of 3,716 metres square (40,000 square feet) and dimensions that would permit it to contain a 45 metre (147.63 feet) diameter circle within its boundaries".

The proposed lot is the type of lot described in Schedule

"C" of the Regulations since it is bounded on one side by a river, the Clyde River, a "watercourse" as defined by Section 3(s) of the Planning Act. The proposed lot is less than 1/2 the area of the lot contemplated by Schedule "C".

The matter does not end there.

Section 7(2) of the Regulations goes on to say:

> "Notwithstanding the lot area requirements of contained in subsection (1), where an authorized person of the Department of Health has assessed the proposed lots shown on a final plan of subdivision and approved such lots for the installation of on-site sewage disposal systems, such lots shall be deemed to meet the lot area requirements contained in Schedule "C" of these Regulations."[emphasis that of the Board]

Perhaps this subsection of the Regulations applies to this subdivision application, in which case Schedule "C's" lot area requirements are met through a process of deeming. The Board will deliberate further on this point later.

Section 8 of the Regulations may also bear on the outcome of this appeal.

"8. Where a Land Use By-law is in effect:

> a) notwithstanding Section 7, all lots shall meet the applicable dimensions for minimum lot areas and lot frontage contained in such by-law, and
>
> b) Sections 6(b) and (c), 9, 10, 12 and 13 are inoperative and do not apply unless the land use by-law permits development on any lot created pursuant to these sections and the municipal planning strategy provides for both the subdivision and development of such lots."

There is an M.P.S. and L.U.B. applying to the lots.

There are two policies dealing with subdivision in the Implementation Chapter of the M.P.S. Policy H-7 states that it is

Council's intention to adopt a Subdivision By-law in accordance with the Planning Act. Policy H-8 states it is Council's intent to delegate the administration of the Subdivision By-law to the development office. There is a long discussion of subdivision in the Environmental Development Chapter of the M.P.S. specifically relating to public road frontage.

The M.P.S. was approved by the Minister of Municipal Affairs on December 16, 1985. The Provincial Subdivision Regulations came into effect on August 4, 1987. The Board is satisfied that the existing M.P.S. meets the wording of Regulation 8(b) and Regulation 9 therefore applies in this case.

Sections 6(b) and (c) of the Regulations have no application to this appeal. Section 10 does not help or hinder the resolution of this appeal.

Section 13 deals with exceptional approval of the subdivision of land creating an undersized lot without an on-site sewage disposal system. The maximum size of this type of undersized lot is only 5005 square feet. The lot proposed here is in excess of 19,000 square feet. Thus Section 13 of the Regulations has no help for the parties to this appeal.

Section 12 of the Regulations may apply to the subject area. Even if it does, there is no relief for the subdivider since it seems to deal with situations where the nature of the fronting road is a question. Here the road frontage requirements are met. Section 12 does not, therefore, have a determinative effect on this appeal.

Section 9 of the Regulations reads:

"9. (1) Notwithstanding Sections 7(1) and 8(a), the Development Officer may approve a maximum of two lots, shown on a plan of subdivision, in accordance with Section 98 of the Planning Act, hereto annexed as Appendix "A", provided all other requirements of these regulations are met.

(2) Subsection (1) shall not vary the dimension for frontage below 6 metres (19.7) feet or the minimum dimension for area for lots served by an on-site sewage disposal system."

Section 98 of the Planning Act contained in Appendix "A""

"98. (1) Where provincial subdivision regulations or a subdivision by-law specifies minimum lot dimensions or lot area where the regulations or by-law so provides, the development officer may approve a plan of subdivision which shows not more than two lots which do not meet these requirements provided that the lot area and dimensions are not less than ninety percent of the required minimums for the lot area and dimensions.

(2) No approval shall be granted where the difficulty experienced is general to the properties in the area or results from the intentional disregard of the requirements of the subdivision regulations or subdivision by-law." [This is now Section 107 of the Planning Act].

This section of the Regulations may allow the Development Officer to approve the present application for subdivision. The lot is approximately only 50% of the area required under Section 7(1) of the Regulations. The lot area is well within the 90% of the minimum lot area required by Section 8(a) of the Regulations. There are a maximum of two lots to be approved in this application for subdivision approval. No one adduced evidence to show an intentional disregard, on the part of the applicant, of the requirements of the Regulations. The evidence does not mention any difficulties experienced in general to properties in the area.

Section 9(2) of the Regulations prevents the approval of these maximum two lot subdivisions whose lots are serviced by "an on-site sewage disposal system". This raises the question of whether the sewage holding tank described in this land is an "on-site sewage disposal system". The Planning Act and the Regulations do not define "on-site" sewage disposal system".

The Health Act 1989 R.S.N.S. c. 195, s. 2(v) says:

> ""private sewage disposal system" means all types of sewage disposal systems not directly connected to a municipal or approved central sewerage system including a privy and a septic tank with a disposal field."

The Health Act has no definition of "on-site sewage disposal system". [The Board has no copy of any regulations passed under the Health Act]. The holding tank approved by the Department of Health and installed on Lot 1 falls within the Health Act's definition of "private sewage disposal system".

Section 38(1) of the Health Act reads:

> "No person shall install a private sewage disposal system except with the written permission of the Board of Health".

The evidence shows that the subdivider installed such a private sewage disposal system [holding tank], with the required written permission, on Lot 1.

Section 35(2)(i) [p. 12] of the Regulations reads:

"(2) Final plans of subdivision shall show the following:

...

(i) each lot being approved identified by a number except where a parcel is being added to or subtracted from an existing area of land, the parcel shall be identified by a letter and the new lot identified by the existing area of land identifier, where applicable, and the letter.

...

39(1) The subdivider shall pay the fees contained in the Costs and Fees Act, R.S.N.S. 1967, c. 63 [now R.S.N.S. 1989, c. 104] for filing the endorsed final plan of subdivision [$20.00], certifying a copy of the plan [$3.00], and registering a notice of approval of the plan. [$30.00 for a grand total of $53.00].

(2) The fee referred to in subsection (1) shall be paid at the time of application for approval of the final plan of subdivision by cheque or money order made payable to the Registry of Deeds.

(3) Where the final plan of subdivision does not receive endorsement of approval by the Development Officer, the subdivider shall be entitled to the return of the cheque or money order referred to in subsection (2)."

This seems to complete the extraction from the Regulations of parts of the Regulations especially pertinent to this appeal. In addition, segments of other legislative bits incorporated in, or mentioned in, the Regulations have been set out.

The Board will now make more detailed reference to certain Planning Act and Municipal Board Act provisions that may apply to this appeal's determination:

First, from the Planning Act:

> "3. In this Act, unless the context otherwise requires,
> a) "Board" means the Nova Scotia Municipal Board;
>
> f) "development officer" means a development officer administering the applicable provincial land use or provincial subdivision regulations...;
>
> 115(1) Where a development officer refuses to approve a plan...of subdivision, the applicant therefor may appeal the decision to the Board.
>
> ...
>
> (3) In considering an appeal pursuant to this Section, the Board shall determine whether the proposed plan...of subdivision complies with the subdivision regulations or subdivision by-law, as the case may be.
>
> (4) The Board shall

> a) confirm the decision of the development officer; or
>
> b) allow the appeal by directing the development officer to approve the plan or instrument of subdivision.
>
> (5) Where and only where the plan or instrument of subdivision is in accordance with the subdivision regulations or subdivision by-law, whichever is applicable, the Board shall allow the appeal."

As mentioned before this is a case where the Regulations apply, where a provincial development officer has refused an applicant's application for final approval of subdivision, and that applicant has appealed that decision of the provincial development officer to the Board.

Secondly, a few excerpts from the Municipal Board Act:

> "28 In any matter before it, the Board shall grant an order, either as specified in the application or notice of appeal or as the Board decides, and may by order dismiss the application or appeal."

This section was not applied by the Board in a decision Arenburg v. The Town of Amherst (1985) 4-B M.B.D. 428 [often called Arenburg #1]. In Arenburg #1, faced with a somewhat similar legal conundrum, the Board referred to Sections 32(1) and 32(2) [now sections 31(1) and 31(2)] of the Municipal Board Act establishing the Board's power to assess the evidence before it and the legal effect of such evidence. Then the Board was able to refer the development agreement back to Council under the then Section 71(4)(c) of the Planning Act. Here there is no such referral possible unless there are additional board powers under Section 28 of the Municipal Board Act.

In another legal conundrum, also involving the Town of

Amherst, the Board in Saveur et al v. The Town of Amherst (1987) 6-B M.B.D. 14 [NSMB-531-86-P] felt itself to be limited to the remedies spelled out for it under the then Section 63(4) [now 70(5)] of the Planning Act. At p. 47 of the filed decision the Board says:

> "This opinion about the procedure to be followed creates a serious dilemma for the Board. ...[p. 48] The Board is of the ...opinion that it has no alternative based on its options [emphasis of the present Board] available under Section 63(4) of the Planning Act but to confirm the decision of Council...notwithstanding the doubts expressed in this decision. The Board makes this assumption on the basis that it has no power or authority to declare that a municipal by-law is legally invalid or is defective in some respect and must therefore assume the validity of the by-law in question...[p. 49] The Board...dismisses the appeal and confirms the decision of Council."

Mr. Wilson argues the Board is, in this appeal, much constrained in its alternatives under Section 115(4) of the Planning Act - as was the Board in Saveur.

Before leaving previous Board decisions, the Board would like to extract some remarks from Coombes et al v. District of West Hants 1987 6-B M.B.D. 517. In that case, the application for subdivision approval was refused by a development officer. He gave, as his reasons, the written opposition from a Department of Transportation official to the proposed subdivision. Argument and evidence tended to show there was little planning merit in this official's position. At p. 546 the Board said:

> "With respect, the basis on which the Department of Transportation decides to approve or refuse approval for a ... plan of subdivision is beyond the jurisdiction of this Board to consider. ...[p. 547] The Board makes no determination on whether the decision of the Department

> of Transportation to refuse approval for the...plan for...Subdivision was made without jurisdiction, or in bad faith, or without proper determination of the Town's right to refuse access...".

APPLICATION OF LAW TO FACTS OF THIS APPEAL

Regardless of the result of this appeal, there will be no more intensive use of the land in question. Public officials have already officially permitted the present use of the land by the Crowell Family.

Rogers Crowell could achieve his desired result by awaiting the death of the survivor of his mother and father, testate, with a will appropriate to convey Lot 1 to Rogers Crowell (See Section 102(2)(a) of the Planning Act).

From the younger Mr. Crowell's point of view this is not the most satisfactory way to obtain his desired result since:

a) he would be uncertain as to the timing of the deaths of the survivor of his mother and father, as well as to the timing of his own death [which to achieve his objective must follow after the death of his surviving parent].

b) even if he survived his parents, as is statistically probable, he has no assurance that the last surviving parent will still own the property at his death. Even if he does, one is unsure whether the survivor will execute a Will leaving Lot 1 to Rogers.

c) all the while these uncertainties are in existence, Rogers Crowell is inhabiting an expensively developed Lot

1 without any easy ability to convey it in any way. He has no assurance that he will ever be able to deal with Lot 1 as an ordinary owner would.

Regardless of these obvious uncertainties, from a public authority planning point of view, the state must accept the probability that, if the Crowell family so wishes, they may, with the effluxion of time, subdivide Lot 1 for Rogers Crowell, just as it is. On the appropriate death under the appropriate circumstances, the state will be unable to refuse, or to prevent, the subdivision of the Crowell land.

The Board emphasizes the sole purpose of this subdivision application. From the applicant's point of view, he seeks only to make the land freely alienable.

From the state's point of view, a subdivision making Lot 1 might eliminate or decrease the present apparent illegal use of the whole Crowell land. The Crowell's present use of the Crowell's land apparently violates Part 16 of the L.U.B. The subdivision would reduce the number of "Main Buildings" on the one piece of land - perhaps to the legal limit of one main building per lot.

Other than the above, the subdivision proposed will have no wider effect. This is, then, not a planning appeal which affects, in itself, momentous physical consequences of general public concern.

To the Crowell's, the matter is one of importance. With the application of good faith, the effluxion of time and patience in between, they can achieve their objective regardless of the present refusal decision of the Provincial Development Officer. Thus the worst that is happening to the Crowells is a major inconvenience. No one will likely remove Rogers Crowell from his house if the Lot 1 is not produced by the proposed subdivision.

Regardless of the low level of severity and the relative unimportance of the subject matter of the appeal, the Board must attempt to resolve its planning issues. The Board must apply the correct law to the facts.

The Provincial Development Officer resists approving the subdivision, in the main, because an Inspector from the Department of Health, when requested, turned down the lot in these words: "This lot cannot be assessed as it does not meet minimum lot size requirements." and without further explication. This inspector gave no evidence to the Board.

In addition to this major objection to approval of Lot 1, the Municipal Development Officer, on request, gave Mr. Hiltz the opinion: "Lot 1 does not meet the area requirement as per the Municipal Land Use By-law, therefore the request for approval is not acceptable to the Municipality of Barrington."

In his subsequent letter containing his subdivision refusal decision, Mr. Hiltz wrote Rogers Crowell:

> "As the Department of Health will not assess the lot because of its small size, and the Municipality of Barrington states that Lot 1 does not meet the area requirements in the Land Use By-law, Sections 7(2) and 8(a) of the Provincial Subdivision Regulations cannot be met, and therefore, I have no recourse but to refuse the final plan of subdivision."

The Board will deal first with the Municipal Development Officer's opinion that Lot 1 is too small (and, implicitly, that Section 8(a) of the Regulations applies). If this Lot 1 does not have an "on-site sewage disposal system" the minimum area may be reduced to 90% of the minimum required, at first blush, 20,000 square feet. See Sections 9(1) and (2) of the Regulations and Section 107 of the Planning Act.

If Lot 1 has an "on-site sewage disposal system" then it cannot get the necessary area reduction under Section 9(2) of the Regulations. The system is a "private sewage disposal system" under the Health Act. Are these two the same in this case? The Inspector from the Department of Health has treated them as different things. The same inspector who turned down the Lot 1 subdivision approval for the reasons stated above, had previously approved the sewage disposal system for Lot 1 which the Applicant installed and is using.

The ordinary meaning of the words "on-site sewage disposal" means the residue of the process of the sewage system installed would be discharged on or under the surface of the lot itself. A holding tank system, as permitted and installed, contemplates the residue of the process of the sewage system installed would be confined on the site separate from the earth of the lot. Final disposal would encompass the confined residue's removal from the site, usually by a pump/tank truck system for discharge off-site at some place used for such sewage disposal.

In the view of the Board, the bare unexplained statement from Mr. Davis, the Health Inspector, does not accurately state the situation surrounding Lot 1. Lot 1 can meet the minimum lot size requirements of the Municipal L.U.B. The Lot could have qualified. The letter (and the previous granting of the permit for the holding tank) demonstrates to the Board that Mr. Davis had no other health concerns than the size of the Lot. In light of the above, the Board sees no merit in those concerns.

The Board has no jurisdiction to review the actions of any Health Inspector. It cannot order him to perform his functions. The Board cannot issue a declaration declaring the Health Inspector's opinion incorrect in law.

It is not Mr. Davis' opinion that the Appellant is appealing. (see Coombes et al v. District of West Hants supra).

The Board is, however, analyzing the Provincial Development Officer's decision. In that analysis, the Board must test the accuracy of the advice on which the decision complained of is based. The statement from the Health Department is faulty as has been demonstrated above. That being the case, the advice to the Provincial Development Officer from the Health Department was wrong. The wrongness of the advice may colour the quality of the decision made by the Provincial Development Officer. He may not be able to rely on the Health Inspector's report in rejecting the application to subdivide Lot 1.

As the Board interprets the Regulations for the Appellant to succeed in this appeal he must:

1. Move his application out from under the effect of Section 7(1) of the Regulations which invokes the 40,000

square feet of Schedule "C"; and

2. (May) do this under Section 7(2). Section 7(2) will only apply when a public health inspector has:

a) assessed the proposed Lots; and

b) approved such lots for the installation of an on-site sewage disposal system.

There has been no assessment of the lots. Mr. Davis's has not approved the lots for the installation of an "on-site sewage disposal system". He has approved the sewage disposal system for Lot 1. It is something other than an "on-site sewage disposal system". The applicant does not succeed under Section 7(2) in having Lot 1 meet its requirements for area by obtaining a "deemed" area requirement.

3. Since a L.U.B. is in effect, (may) attempt to subdivide under Section 8 of the Regulations "notwithstanding Section 7" if the bare L.U.B. requirements in this zone are only 20,000 square feet. [The Lot area of the remaining lands is well over 20,000 square feet: that of Lot 1 is 19,886 square feet +/-]. Lot 1 may be technically too small by 114 square feet +/-. Can the Board interpret this as meaning 20,000 square feet? The Lot itself has, as one major boundary, the irregular side of a watercourse. Such an irregular boundary notoriously makes the exact calculation of square footage by a simple multiplication of length x width extremely difficult. There are surveyors formulae available for such calculations which must work of some principal of averaging to determine the area enclosed by such an irregular boundary. Since the plan of subdivision is prepared by a Nova Scotia Land Surveyor and contains a calculation of area of Lot 1, the Board will assume, in the absence of any evidence to the contrary, that the plan was properly prepared by a N.S.L.S. who was aware of the appropriate formulae for such calculations. The Board finds he likely applied those formulae in his calculation of the area of Lot 1. 19,886 square feet +/- was the surveyor's best estimate of the area of Lot 1.

Mr. Hiltz has had some training and experience in the land surveying business in Nova Scotia. He admitted that the actual area of Lot 1 could be 20,000 square feet or more. He said it was also as equally likely that the area of Lot 1 was the square footage shown or some lesser square footage. In the absence of a more reasonable explication of the meaning of 19,886 square feet +/- the

Board accepts Mr. Hiltz's position that it is at least equally probable that Lot 1 is undersized as that it is of size within the meaning of Section 8(a) of the Regulations.

Having found this to be a fact, the Board notes the applicant/Appellant in this appeal has the burden of proving to a balance of probabilities the facts to support his case. In this case he has proven, at most, an equal balance whether the Lot 1 contains at least 20,000 square feet. That being the case, he has not satisfied the burden of proving to a balance of probabilities, the salient fact required for the invocation of Section 8(a) of the Regulations to support his position. He has not proven that Lot 1 contains at least 20,000 square feet; and, failing all of the above,

4 (may) try to obtain approval under Section 9 of the Regulations. As previously pointed out this is a two lot subdivision only. It is at least 90% in area of the minimum lot area required by the L.U.B. AS THE BOARD HAS NOTED IN THE PREVIOUS PARTS OF THIS DECISION, LOT 1 IS NOT SERVED BY AN ON-SITE SEWAGE DISPOSAL SYSTEM. Thus the Lot 1 could be approved under Section 9 of the Regulations. As pointed out by Mr. Hiltz the remainder lands apparently meet the requirements for subdivision approval.

Thus the Board concludes that the Provincial Development Officer could have decided to approve Lot 1 (and incidentally the remaining lands) with Lot 1 one lot in a two lot subdivision. Lot 1 is not serviced by an on-site sewage disposal system but is serviced by something other than an on-site sewage disposal system.

The Provincial Development Officer was well advised in this application to inquire of the Health authorities as to their concerns concerning this environmentally sensitive relatively narrow piece of land on a riverbank. The answer to the question of suitability of this Lot for human occupation had already been answered by the Department of Health's approval of the holding tank sewage disposal system. Mr. Hiltz ought to have given greater weight to the fact of that recent approval.

Some might consider the Board's decision in Coombes et al v. District of West Hants supra stood for the proposition that the Board cannot inquire into the secondary governmental information sources used by the Provincial Development Officer. (He referred to the Municipal Development Officer and the provincial Health Inspector for information.) Coombes does not go that far. It deals with a decision of an official of the Department of Transportation made under specific legislative requirements affecting the granting of road access to subdivisions.

In this case the Provincial Development Officer was merely seeking advice from fellow officials. He was still bound to interpret that advice in the context of the planning law he was applying. If the advice was wrong, or non-applicable in the circumstances, he must so evaluate it. If he receives bad or inapplicable advice and follows it, that advice affects the quality of his decision. Incomplete, inapplicable or otherwise erroneous advice given to the Provincial Development Officer in the course of preparing his decision encourages the Board, in reviewing the Provincial Development Officer's subdivision refusal decision, to question his results.

If a person seeks subdivision and is legally entitled to it under some legislation, the Provincial Development Officer must approve the subdivision. He has little or no discretion. The requirements for subdivision are met, or they are not. If they are met, he must approve the subdivision.

In the manner set out above, the Board has determined that the Appellant was entitled to the subdivision applied for.

When the Appellant has paid [again] the fees required under the Regulations for subdivision approval, he will be entitled to subdivision approval of Lot 1 as shown on Exhibit C-13.

DISPOSITION OF APPEAL

The Board has found under Section 115(5) of the Planning Act that the plan of subdivision is in accordance with the Regulations. Therefore under Section 115(4)(b) of the Planning Act, it will allow the appeal and direct the Provincial Development Officer, Ridge Hiltz, to approve Lot 1 on the plan of subdivision as shown on Exhibit C-13.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 6th day of July, A.D., 1990.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

PARRSBORO BOARD OF TRADE v. PARRSBORO & PARRSBORO GROCERY LTD.

PLANNING - DEVELOPMENT AGREEMENT - AGGRIEVED PERSON - DOWNTOWN CORE - PLANNING ACT, S. 78(1)(a), PARRSBORO M.P.S. POLICY 2.1, 2.6, 2.7.

Applicant wished to relocate hardware store from downtown to area near town boundary next to a grocery store. A part owner of the Applicant is also Mayor of the Town. Three other Councillors declared a conflict of interest. The Appellant preferred that Applicant expand in its present location.

HELD: Appeal dismissed, one member dissenting.

In addition to meeting the traditional test of an aggrieved person, the Board of Trade has an interest in the viability of the Commercial Downtown core which may be affected by the proposal and is an aggrieved person irrespective of its interest in property.

The overall intent of the M.P.S. is to promote the downtown core as the commercial centre. While the preamble assists in interpreting the policies of the M.P.S., it is the policies themselves that are paramount where an inconsistency occurs. The Policy requires terms in the agreement to ensure the nature and scale of the development is such that it will not substantially detract from the downtown as the focal point for commercial activity. The policy does not indicate by what objective standard Council is to measure the terms. The terms are intended to have a future impact. The development of one store with a known potential impact on one other store would not substantially detract from the downtown.

NSMB-5-90-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, R.S.N.S. 1989, c. 346, by the **PARRSBORO AND DISTRICT BOARD OF TRADE** from a decision of the Parrsboro Town Council dated February 24, 1990, which approved the entering into of a development agreement with **PARRSBORO GROCERY LTD.** to permit the development of a hardware retail operation behind the existing IGA Grocery Store on Main Street.

BEFORE: MICHAEL G.JOHNSON, Chairman,
LINDA D. GARBER, Vice-Chairman,
RICHARD L. WELDON, Member.

COUNSEL: GARY RICHARD, LL.B., for the Appellant,

ANTHONY MORLEY, LL.B., for the Town,

DAVID CHRISTIE, LL.B., for Parrsboro Grocery Ltd.,

HEARING DATES: June 5th and 13th, 1990.

DECISION DATE: July 31, 1990.

DECISION: **Appeal Dismissed, One Dissent**

DECISION

Stanford Blenkhorn and his wife own S & L Home Hardware Ltd. on Main Street in Parrsboro. Mr. Blenkhorn is also a part-owner with other members of his family of Parrsboro Grocery Ltd., the Applicant in this appeal.

Parrsboro Grocery Ltd. operates an I.G.A. store on Upper Main Street in Parrsboro. The company applied to the Town to enter into a development agreement to build an addition to the I.G.A. store to permit S & L Home Hardware to move to this new location. The new location will permit the store to expand its size and to operate a retail garden centre.

Mr. Blenkhorn is the Mayor of the Town of Parrsboro. He declared his conflict of interest and did not participate in the Council meetings during discussions of this matter. During the process, three Councillors determined they were in a conflict of interest and did not participate in the decision. Other than what is included in Council Minutes, the Board received no explanation of this declared conflict of interest. Under the Towns Act, a majority of Council constitutes a quorum. In the Town of Parrsboro there are 7 members of council including the mayor. A quorum would be 4 members. Section 8 of the Municipal Conflict of Interest Act provides for a reduced quorum where Council lacks a quorum because of declared conflicts of interest. The reduced quorum is one-third of the Council, in this case, three members.

The three remaining councillors who composed the quorum eventually decided on a motion of 2 to 1 to approve the Town entering into a development agreement with Parrsboro Grocery Ltd. as requested.

The Parrsboro and District Board of Trade appealed Council's decision on the basis that it conflicts with the

Municipal Planning Strategy (M.P.S.).

At the commencement of the hearing, the Board asked the Appellant to establish that it was an "aggrieved person" within the meaning of Section 78 of the Planning Act.

The Board of Trade has had some difficulty in obtaining its complete files. It was unable to produce a certificate of incorporation. The Board reviewed the following Exhibits relating to the issue of incorporation:

P-1 Certificate of Formation and Memorandum of Agreement dated December 5, 1988 for the Parrsboro & District Board of Trade. This document appears to be an application to the Department of Consumer and Corporate Affairs.

P-7 A copy of a document dated 1899 which seeks incorporation of the Board of Trade of Parrsboro.

P-9 A computer printout of Canadian Federal Corporations showing the registration of the Parrsboro Board of Trade, File No. 0006807, incorporated on May 18, 1899.

P-10 A copy of the Annual Summary Form under The Board of Trade Act which is dated 1990 addressed to the Parrsboro Board of Trade with the number 000680-7-R.

Following the receipt of this evidence, the solicitor for the Appellant made a motion to amend the Notice of Appeal pursuant to the Board's Rules. The Board granted the amendment to the

Parrsboro Board of Trade, deleting the words "and District".

The Board is satisfied that the Parrsboro Board of Trade is incorporated and therefore a person.

The Board heard evidence the Appellant has an interest in property in the downtown core of Parrsboro. The Appellant owns and operates a Tourist Bureau on Town owned land. The Board is satisfied the Appellant's interest in this property may be affected by this rezoning and that the Appellant meets the traditional test of an "aggrieved person" within the meaning of Section 78(1)(a) of the Planning Act (formerly Section 71(1)(a)) as set out in Riverlake Residents Assoc. v. County of Halifax (1985), 4-B M.B.D. 122.

The Board further determines that Parrsboro Board of Trade has an interest in the viability of the commercial downtown core of Parrsboro separate and apart from its interest in land. The viability may be affected by the proposed development agreement. The Board finds that the Parrsboro Board of Trade is also an "aggrieved person" within the meaning of Section 78(1)(a) irrespective of its interest in property.

One of the primary intents of the Town of Parrsboro M.P.S. is:

> "To preserve the downtown core as the focal point of commercial, institutional and public administration activities in Parrsboro."

At present S & L Home hardware is located in the downtown core. The proposed location is outside the downtown core in an area zoned Highway Commercial.

The Town has participated in the Provincial "Main Street" program and considerable monies have been spent upgrading the downtown core. The Appellant is concerned that by permitting the proposed development agreement, a new commercial centre will develop in that part of Town to the detriment of the downtown core.

The Appellant is not opposed to the expansion of the Home Hardware Store but suggests that it expand on its present site. Mr. Blenkhorn testified that expansion at the present site would require purchasing of adjacent property and demolishing some buildings. Mr. Blenkhorn estimated the cost to acquire this additional property (assuming it was available) would be $100,000.00. The land where he proposes to expand is owned by Parrsboro Grocery Ltd. and can be developed at considerably less additional cost.

The Municipal Planning Strategy (M.P.S.) for the Town of Parrsboro has six primary goals, three of which govern this appeal:

> 1. To encourage new residential, commercial and industrial development to occur in an orderly, economic manner;
>
> 3. To preserve the downtown core as the focal point of commercial, institutional and public administration activities in Parrsboro;
>
> 5. To stimulate economic growth, particularly in the tourism industry, to the greatest extent possible while at the same time endeavouring to preserve the community's environmental, historic and social qualities;

There is an emphasis throughout the Commercial Development section of the M.P.S. on maintaining the downtown core as a focal point. Policy 2.1 states:

> "It shall be the intention of Council to encourage the downtown area of Parrsboro to remain the focal point of retail, office, banking and public administration activities within the Town."

In addition to the downtown core, commercial development is permitted in the Residential - Commercial (RC) Zone which is adjacent to the downtown core and in the Highway Commercial (HC) Zone which is located on Upper Main Street near the Town boundary.

During the hearing some confusion arose over the various areas zoned Highway Commercial. The Future Land Use Map designates only the area on Upper Main Street as Highway Commercial. Policy 7.3 of the M.P.S. clarifies the matter. In order to avoid creating non-conforming uses, spot zoning was used for existing uses. This policy governs the various Highway Commercial zones in the Town.

Policies 2.6 and 2.7 deal with the Highway Commercial Zone. The two policies and the preamble to each are as follows:

> "Efforts to encourage development of the downtown may not be successful if large-scale office or retail developments occur outside of the downtown. Commercial activity outside the downtown should be limited to highway-oriented activities such as used car lots and service stations, tourist oriented businesses, and small-scale businesses such as small convenience stores and home occupations which are acceptable in residential areas. The most appropriate area for highway-oriented commercial development is Upper Main Street adjacent to the town boundary; traffic volumes in the area are double those on the other main entrance to Town, Eastern Avenue.
>
> Policy 2.6
>
> IT SHALL BE THE POLICY OF COUNCIL TO CREATE IN THE LAND USE BYLAW A ZONE TO BE CALLED THE "HIGHWAY COMMERCIAL" OR HC ZONE. WITHIN THIS ZONE A VARIETY OF HIGHWAY-ORIENTED COMMERCIAL ACTIVITIES, RESIDENTIAL ZONE USES AND INSTITUTIONAL USES WILL BE PERMITTED, BUT OFFICE USES AND MAJOR RETAIL OPERATIONS, (OVER 300 SQ. M. IN FLOOR AREA)

> SHALL BE EXCLUDED. ALL LANDS SHOWN ON THE FUTURE LAND USE MAP (MAP 1) AS "HIGHWAY COMMERCIAL" SHALL BE ZONED HC.
>
> Although the primary intent of this MPS is to concentrate commercial development in the existing downtown area, proposals may be received to construct major retail or office type developments in the Highway Commercial Area. These developments should be approved if it can be demonstrated that they will not substantially detract from the stability and vitality of the downtown.
>
> Policy 2.7
>
> IT SHALL BE THE POLICY OF COUNCIL TO CONSIDER PERMITTING OFFICE AND MAJOR RETAIL ACTIVITIES IN THE AREA DESIGNATED "HIGHWAY COMMERCIAL" ON THE FUTURE LAND USE MAP BY MEANS OF A DEVELOPMENT AGREEMENT. IN NEGOTIATING THE AGREEMENT COUNCIL SHALL ENSURE THAT TERMS ARE INCLUDED IN THE AGREEMENT TO ENSURE THAT THE NATURE AND SCALE OF THE DEVELOPMENT IS SUCH THAT IT WILL NOT SUBSTANTIALLY DETRACT FROM THE DOWNTOWN AS THE FOCAL POINT FOR COMMERCIAL ACTIVITY IN PARRSBORO."

The overall intent of the M.P.S. is to promote the downtown core as the commercial centre. There is, however, provision to permit major commercial development in the Highway Commercial Zone by development agreement.

In comparing the preamble to Policy 2.7 and the actual policy, differences in wording are noted. The preamble suggests that Council approve major retail developments "if it can be demonstrated that they will not substantially detract from the stability and vitality of the downtown." No guidance is given as to how the effect on the stability and vitality is to be demonstrated.

The actual policy does not require any demonstration but places a duty on Council to ensure that "terms" are included in the development agreement "to ensure that the nature and scale of the development is such that it will not substantially detract from the downtown as the focal point for commercial activity in Parrsboro."

It can be argued that to "substantially detract from the stability and vitality of the downtown core" is not the same as to "substantially detract from the downtown as the focal point for commercial activity". If for example, the post office which is now downtown were moved to the Highway Commercial Zone it could substantially detract from the stability and vitality of the downtown core in that persons would not have to go downtown regularly to pick up their mail and as a result not stop at other businesses. Such a move would not, however, substantially detract from the downtown as the focal point for commercial activity since except for the sale of stamps, the downtown would remain the focal point for commercial activity in downtown core.

The Cumberland District Planning Commission assists the Town in planning matters. Both Janet Sponagle and Jens Jensen of the Commission prepared reports and met with Council on different occasions to discuss the application. Both Ms. Sponagle and Mr. Jensen discussed with other experts the possibility of conducting studies or surveys to determine whether or not the stability or viability of the downtown core would be affected. They were advised that various studies and surveys would not give the required information.

The Applicant did not present statistical evidence to Council or to the Board to demonstrate the impact of the proposed development on the stability or vitality of the downtown core.

Mr. Blenkhorn in his testimony said he hopes that another business will operate in the premises he is vacating. He said he has received some inquiries.

The Appellant led no specific evidence to show the proposed development will substantially detract from the stability and vitality. One person did testify that he felt that his tourist business, an Inn, might suffer as a result of the relocation. The Inn is not located in the immediate downtown core. No retailer or other business person from the downtown core made a presentation other than the Appellant.

The preamble to Policy 2.7 does not indicate whose responsibility it is to demonstrate that a proposal will not substantially detract from the stability and vitality of the downtown. In this case the Applicant did not attempt to so demonstrate. The Planning Commission attempted to obtain some statistical information but were unsuccessful. It is difficult to predict future events. In the example cited above it appears obvious the the relocation of the post office would substantially detract. The relocation of the hardware store is not so obvious.

Neither Policy 2.7 nor its preamble distinguish between a new business being developed in the Highway Commercial Zone and an existing downtown business moving from downtown to the Highway Commercial Zone. It appears to the Board that there must be some detraction to the downtown core when a retail business moves from the downtown core to the Highway Commercial Zone. The evidence before the Board does not demonstrate that the relocation of the S

& L Home Hardware Store will substantially detract from the stability and vitality of the downtown core nor does it demonstrate the it will not substantially detract.

While the preamble assists in interpreting the policies of the M.P.S., it is the policies themselves that are paramount expecially where an inconsistency may occur. In this case, Policy 2.7 requires that terms be included in the development agreement to ensure that the nature and scale of the development is such that it will not substantially detract from the downtown as the focal point for commercial activity.

Ms. Sponagle testified that such terms were included in the proposed development agreement. The terms are as follows:

1. A limit on the total floor area of the existing I.G.A. store and the proposed hardware store of 1,393 sq. metres;
2. The use of the proposed building be restricted to the sale of hardware goods and the existing store to the sale of groceries;
3. The area for hardware goods be a maximum of 929 sq. metres including storage of which no more than 743.2 sq. metres for retail use;
4. The line of goods restricted to those normally found in a "hardware store" including building supplies.
5. A garden centre or Christmas tree lot may be operated in season as an accessory use in a fenced in area, maximum dimension of 50' x 80'.

6. The hardware store is restricted to specified hours although the grocery store may operate for additional hours. It is suggested that this restriction prohibits the store from being open during special downtown hours such as "Midnight Madness".

7. The height and type of material for the fenced in area is specified and there is no outdoor storage except within a fenced in compound.

Do these terms satisfy Policy 2.7? The limit on the type of goods would prevent the development of a department store which was a concern of the Appellants. This term also prevents a post office from opening up in the grocery store. It also limits, to some extent, the nature of the proposed development.

The terms dealing with the size of building and the requirement to fence in storage do address the scale of the proposed development.

It can be argued that the term respecting hours of operation has an impact on the nature of the business.

The Appellant did not suggest any alternative or additional terms to the Board. It was noted there is a large range of goods available in a hardware store. The Appellant argued that a similar size operation could be achieved on the existing site. The Applicant argued that building supplies were not an appropriate use downtown and would detract from the current upgrading of the downtown core.

While stricter terms could be included in the development agreement, the effect would in all likelihood preclude the development from preceeding. The policy as drafted does not indicate by what objective standard Council is to measure whether or not the terms included are sufficient to ensure that the nature and scale of the development is such that it will not substantially detract. The terms are intended to have a future impact and it is not possible to determine in advance whether the terms will achieve their objective.

One of the Appellant's goals is to keep the hardware store downtown. While this is understandable, there is nothing to prevent the store from closing and locating outside the Town. Mr. Blenkhorn has stated, however, that he does not intend to do this.

One of Mr. Blenkhorn's goals in relocating and expanding the hardware store is to attract customers who now travel to Amherst for their hardware needs. He believes that if these customers come to his store they will shop in other stores in the downtown. It is his opinion that if they drive to Amherst for hardware goods they will likely make other purchases while in Amherst. He believes that if they can obtain the hardware goods in Parrsboro, they will make these other purchases in the Town rather than drive to Amherst.

Will the development of the S & L Home Hardware store on its proposed site adjacent to the I.G.A. substantially detract from the downtown as the focal point for commercial activity? It is possible that persons who shop at the store in its present location purchase their groceries at the Co-op which is across the street.

If the hardware store relocates those people may purchase their groceries at the I.G.A. It is obviously the hope of Parrsboro Grocery Ltd. that the relocation will increase the number of customers at the I.G.A. Is the development of one store with a known potential impact on one other store in the downtown core sufficient to substantially detract from the downtown as the focal point of commercial activity? The Board does not believe so.

Many small towns in Nova Scotia have found it difficult if not impossible to protect their downtown businesses from competition from shopping malls located on the outskirts of town. In Parrsboro's M.P.S. there is an attempt to emphasize and protect the downtown core from other commercial areas in the Town. Policy 2.7 as drafted, however, allows Council to permit major retail development in other parts of the Town. Although the policy appears to have some conditions in it which would limit such development, the policy does not give guidance as to how the conditions are to be assessed. The Board is satisfied that Council, in setting the terms of the proposed development agreement, gave consideration to the requirements of the policy.

It is always preferrable to have a decision which is supported by the whole Council or at least a clear majority of the members. In this case it was not possible to have such a decision. The Minutes reveal that two Councillors declared a conflict because they are downtown merchants. Two other Councillors operate convenience stores. One of them apparently felt that he had a conflict but the other did not. The Minutes also indicate that there was some concern that two of the remaining three Councillors might have a conflict but neither declared a conflict. One of these two Councillors voted against entering into the proposed development agreement. The Board was given no further details with respect to these matters.

The Board has considered all the evidence presented and reviewed the relevant policies of the M.P.S. While the overall intent is to protect the downtown core, there is provision to allow major retail development in the Highway Commercial Zone by development agreement. The Board is required to determine whether Council's decision is reasonably consistent with the intent of the M.P.S. The Board is satisfied that Council's decision is reasonably consistent with the intent of the M.P.S. The Board dismisses the appeal and confirms the decision of Council.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 31st day of July, A.D., 1990.

MICHAEL G. JOHNSON,
Chairman.

LINDA D. GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

DISSENTING OPINION

I have had the privilege of reading the decision of my fellow Board members.

I agree with the facts as found by them generally and the methods of reasoning they used to get to their conclusion.

With respect, I am unable to agree with their interpretation of the intent of the M.P.S. I am also unable to give the same full credit to the decision of Council that my fellow Board members did.

In my view, a decision of Council arrived at, as this one was, by a positive decision of two out of seven members of Council (three voting) bears the strictest scrutiny when testing its reasonableness under the Planning Act. Perhaps my differences from my colleagues here are more ones of emphasis rather than result.

In any event, I agree that Council can approve major commercial development in the Highway Commercial zone by development agreement. To do so it must ensure that the development agreement contains terms to ensure that the nature and scale of the development is such that it will not "substantially detract from the downtown as the focal point for commercial activity."

It is my view, not shared by my colleagues, the Council did not have before it information which would allow it to reasonably arrive at its decision. In my view, there was a burden on the Applicant to satisfy Council with numerical facts on this point. If it failed to do so, and if Council wished to proceed as

it did, Council should have taken steps on its own to so satisfy itself that the numbers ensured the survival of downtown.

In this case, in my view, Council did neither of the above.

The minutes of Council and of the process leading up to Council's decision are exhaustive. They do not indicate to me that the terms address the necessary "ensuring" required by the M.P.S. In my view, they could not since Council had no information (data or statistics) on which to test the effect of the proposed development on the downtown core or whether the effect would be substantial. To decide, Council needed supporting numbers.

In my view, the planning advice (received by Council) that no studies or statistical information were easily available and therefore were unnecessary was wrong in the light of the policy to "ensure."

A decision of Council, so firmly based on incorrect advice, could not, in my view, reasonably conform to the intent of the M.P.S.

In result, I would allow the appeal and refer the matter back to Council to review the proposed development in the light of my interpretation of the intent of the M.P.S.

DATED At HALIFAX, Nova Scotia, this 31st day of July, A.D., 1990.

RICHARD L. WELDON
Member
NOVA SCOTIA MUNICIPAL BOARD

WHITE AND SMITH v. **CAPE BRETON & McLEAN**

PLANNING - REZONING A-2 TO M-1 - HEAVY EQUIPMENT - BEST INTERESTS OF THE MUNICIPALITY - PLANNING ACT, S. 70(7).

The Applicant was in violation of the L.U.B. in maintaining heavy equipment on his property which was zoned agricultural. He applied to rezone a portion of the land. Applicant had recently built a single family home on the property. Planning authority recommended against approval but P.A.C. and Council approved.

HELD: Appeal dismissed.

The unanimous decision of Council was, itself, a strong indication of what is in the best interests of the Municipality. The Board could find no specific evidence sufficient to cause it to interfere with Council's decision.

NSMB-8-90-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, R.S.N.S. 1989, c. 346, by **ARDEN WHITE** and **EILEEN SMITH** from a decision of the **COUNCIL OF THE MUNICIPALITY OF THE COUNTY OF CAPE BRETON**, made March 20, 1990, which rezoned property owned by **LEO J. MacLEAN** located on Maple Street, Scotchtown, Cape Breton, from Agricultural 2 (A-2) to Industrial (M-1).

BEFORE: MICHAEL G. JOHNSON, F.C.A., Chairman.

COUNSEL: ARDEN WHITE and EILEEN SMITH, on their own behalf;

M. JOSEPH RIZZETTO, LL.B., on behalf of the Applicant, Leo J. MacLean;

DAVID N. MUISE, LL.B., on behalf of the Municipality of the County of Cape Breton.

HEARING DATE: June 18, 1990.

DECISION DATE: August 1, 1990.

DECISION Appeal Dismissed.

DECISION

Leo J. MacLean of Leo J. MacLean Construction Limited applied to have a portion of his property rezoned from Agricultural 2 (A-2) Zone to Industrial 1 (M-1) Zone. His property is located at the very end of Maple Street on the southern side. Maple Street is a dead-end street located in Scotchtown, Cape Breton County and is unpaved.

The total land on Maple Street owned by Mr. MacLean is approximately 8 3/4 acres. The proposed M-1 Zone would start 300 feet from Maple Street and run for a depth of 308 feet, including the entire width of the property at this point which measures from 130 feet to 140 feet (approximately 42,000 square feet).

There is a short dirt road known as Rose Street which runs perpendicular to Maple Street along the side of Mr. MacLean's property. There appears to be only one house located on the street. This street has the appearance of a driveway to this house, and to the rear of Mr. MacLean's property from which he operates his business.

Mr. MacLean's construction company is mainly involved in the installation of building foundations. In connection with this business Mr. MacLean operates five single-axle trucks (one half-ton, one one-ton, two three-tons and one five-ton) plus two trailers, one backhoe and assorted other equipment. As well as the vehicles, he stores various supplies related to his business, including the foundation cement forms, on the property. In addition, he carries out minor repairs on the vehicles on the site. His business currently employs nine people and has employed up to seventeen. He operates about five months per year (spring until fall).

Mr. MacLean has just completed construction on a new single-family residence on the property. He has moved into the house with his wife and four children some months ago and operates his business from there. Prior to the construction of this house, Mr. MacLean had used the property for storage of various construction supplies since 1985.

In January, 1990, Mr. MacLean applied for the rezoning in response to a letter from the Cape Breton Metropolitan Planning Commission (CBMPC) advising him that he was in violation of the County's Land Use By-law (L.U.B.). The CBMPC in a report dated February 5, 1989, recommended rejection of the rezoning application. The report contained the following "Comments" and "Recommendation".

> "Comments: The proposed site is located at the far end of Maple Street; which is a dead end street. For this reason, all heavy truck and equipment associated with the operation must drive through the residentially developed sections of Maple Street and Ryan Street before entering the #28 Scotchtown/River Ryan arterial road. The surrounding neighbourhood is a mixture of older and new single family dwellings. The proposed site slopes down away from Maple Street and is absent of any vegetation. As such, the existing operation is in direct view to many of the immediate neighbours.
>
> Generally, contracting operations are relatively obnoxious land uses by reason of sight and sound. In many cases, various parts and equipment associated with heavy equipment can be found as outdoor storage. Conflicts with adjacent land uses can sometimes be reduced by an adequate separation distance and screening by either natural vegetation or opaque fencing. However, because the site is low lying in relation to the existing residential uses along Maple Street, it is doubtful that the operation can be effectively screened. It is the opinion of the Planning Commission staff that it is the residents of a particular neighbourhood who will be required to adjust to the introduction of a new type of land use. We believe one must protect the existing residential uses from the intrusion of uses that may adversely affect them.

> Recommendation: The Planning Commission staff does not consider this application to be in the best interests of the Municipality. We therefore recommend rejection of the zoning amendment."

The Planning Advisory Committee (P.A.C.) considered the application at its meetings of February 6th and March 13, 1990, and recommended final approval to Council.

The minutes of P.A.C. are quite detailed. Mr. MacLean spoke on his own behalf. Kenneth Smith of C.B.M.P.C. clarified portions of his report. Three residents of Maple Street spoke in favour of the rezoning and two in opposition. One of the residents, Stanley MacLeod; stated that his name appeared on the petition opposing the application but after receiving further information he now had no objection to the present operation.

Councillor for the area, William Williamson discussed a number of the pros and cons of the application. The Minutes of the March 13, 1990, meeting state the following:

> "Mr. Bill Williamson, Councillor for the area, spoke on the matter. He informed the meeting that Mr. MacLean has been located at that property since 1980. Councillor Williamson told the meeting that he is not in favour of petitions being signed by people who do not live in the area. There are 26 names on the Petition opposing the rezoning who do not live on Maple Street. When the matter first came to light, he had received calls from people requesting that he attend a meeting to discuss the situation but to date there has been no meeting arranged. He explained that he does not know enough about the matter. Perhaps if there had been a public meeting at the outset the situation could have been resolved. With respect to the burning of debris, there are County By-laws to deal with that. He does not agree with trucks travelling on the street at all hours as there should be restricted times. With respect to the rezoning Councillor Williamson stated that he cannot

> see any problem with it if the business is run properly, however there are many pros and cons. He indicated that he will be obtaining additional information and addressing the matter at the next meeting of Council."

At a public hearing held at the Council Meeting on March 20, 1990, Council gave final approval to rezone the subject land from Agricultural 2 (A-2) Zone to Industrial 1 (M-1) Zone. The Minutes of the Council Meeting do not provide much detail. However there is evidence to show that Council did consider the application in light of the best interests of the Municipality. It did consider the concerns of the residents opposing the application and was aware of the position of Mr. MacLean. The decision of Council was unanimous including Councillor Williamson.

The Board received the Notice of Appeal from this decision on April 12, 1990. The Appellants, Arden White and Eileen Smith, are both residents of Maple Street.

At the commencement of the hearing, the Board was made aware of the fact that the Appellants had not received the Appeal Record until 9:00 a.m. the morning of the hearing. The Board adjourned the hearing for an hour and a half to allow the Appellants time to review the Appeal Record and determine if more time was needed. After reviewing the document the Appellants agreed to continue.

During the adjournment the Board took a viewing of the site noting the various characteristics of the subject property.

In addition to the testimony of the two Appellants, three other neighbours were called as witnesses for the appellants. At the evening session two more neighbours testified against the amendment. The concerns of the opposing neighbours, which may relate to planning considerations, can be summarized as follows:

1. There are no sidewalks on the street and therefore this creates fear for children's safety with increased vehicle traffic;
2. Noise level from the trucks which are reported to start early in the morning and continue on until late evening on a daily basis;
3. A negative effect on property values;
4. Unsightly premises on the subject property;
5. Dust created by traffic;
6. Excessive burning on Mr. MacLean's property of waste removed from construction sites.

Mr. MacLean testified on his own behalf. In addition to the information provided to P.A.C. and Council during the course of the application process, Mr. MacLean stated that there was no other suitable site within a reasonable distance where he could store his equipment. He also indicated that security would be a major problem in any other location. No alternate location was suggested to the Board during the hearing. Although these are not necessarily planning considerations, they may well have had an effect on Council's consideration of the best interest of the municipality when weighing the economic affect of the application.

At the evening session three people testified in favour of the rezoning. One of these witnesses operates his own earth moving equipment, frequently for Mr. MacLean. He stores this piece of equipment on his property which is located at the start of Maple Street at the corner of Ryan. He stated he has received no complaints concerning his operations.

The Municipality of the County of Cape Breton does not have a Municipal Planning Strategy (M.P.S.) for the area of the County which includes the subject property. Under such circumstances, Section 70(7) of the Planning Act defines the powers of the Board when dealing with a Council's decision to amend a Land Use By-law (L.U.B.). It states:

> "...the Board shall not interfere with the decision unless the decision of Council is inconsistent with or unnecessary for the protection of the best interests of the Municipality."

In assessing the evidence before it the Board must follow this directive.

The Board is aware of the fact that in any residential neighbourhood a rezoning to an industrial use becomes a very emotional issue. The situation in this appeal is no exception. It is quite obvious to the Board that there are very strong feelings both for and against Mr. MacLean's business operating on Maple Street, many of which may be of a more personal nature than related to planning concerns.

The Board in its decision in Power v. County of Cape Breton (1986) 5-B M.B.D. 478 at page 488, made the following comment:

> "The Board might easily draw the inference in an appeal like this one that the decision of Council is itself a

> strong indication of what is in the best interests of the Municipality even when there was no such express finding by Council".

The drawing of such an inference from Council's decision was also discussed in Lee v. County of Cape Breton (1986) 5-B M.B.D. 209 and in Long/MacMillan v. County of Cape Breton (1989) 8-B M.B.D. 581. For a variety of listed reasons, the Board did, draw such an inference in both Power and Long/MacMillan. In Lee it did not, in part, because Council may have acted on inaccurate information and therefore could not be acting in the best interests of the Municipality.

Although the facts relating to these decisions may be somewhat different, many of the matters considered by the Board concerning drawing such an inference from Council's decision can be applied to the present circumstances.

The Board also examined MacIntyre v. County of Cape Breton (1987) 6-D MBD 616, which appeared to have similar circumstances to the current situation. In the circumstances of the MacIntyre case, the Board allowed the appeal. However on closer examination, the Board has noted a number of important differences.

In MacIntyre the applicant was already operating, as of right, a business from his house for forty years. He wished to move it 800 feet away to a newly acquired property. Therefore, there was minimal economic impact on the Municipality, as he could continue to operate his business.

A new zone was being created to accommodate the applicant which raised certain considerations which are not before the board in this current appeal.

There was a draft M.P.S. for the district under review which provided some guidance to the Board. No such draft is available to assist the Board in this appeal.

The area of land subject to rezoning in MacIntyre was 2.75 acres, and therefore subject to possible future uncontrollable development if rezoned. The area currently under review is less than one acre and is fully utilized by the current operation.

The Board has examined the evidence before it and reviewed the arguments presented. The evidence before Council and the Board was essentially the same.

The Board believes that the decision of Council was an informed one based on adequate information. There is no new evidence before the Board nor is there any evidence that Council acted on erroneous or incomplete information.

Council was aware of the negative report of the C.B.M.P.C. relating to the impact of the application on the residents of the immediate area. Both P.A.C. and Council considered the best interests of the Municipality for a larger area than the immediate adjacent properties on Maple Street while the planner confined his report to a consideration of conflicts with adjacent land uses. The planner, Mr. Smith, did not testify so the Board was unable to determine if his opinion would remain the same of his considerations were to be extended beyond these adjacent land uses.

The Board supported this broader approach in Long/MacMillan. At page 607 it stated:

> "The Board does not believe that the consideration of the "best interests" must necessarily be confined solely to one small segment of the Municipality."

Mr. Smith's comments quoted earlier in this decision appear to focus on buffering considerations. The Board, from its own view of the site, believes that only the neighbours occupying the house on the corner of Maple and Rose Streets and the house directly across from the site would have a direct view of the existing operation. The Board is also of the view that, in spite of the fact that the site is somewhat below the level of Maple Street, a combination of vegetation and some opaque fencing could provide some screening of the site. Here again, the appearance of the planner before the Board may have been helpful.

In spite of the opposition of the residents of Maple Street, who were represented by counsel at the public hearing, the members of Council unanimously felt that their concerns were outweighed by the considerations of economic development and the creation of employment.

In the Long/MacMillan decision at pg 607, the Board stated:

> "The economic conditions of the Municipality are well known to the Councillors and a high priority is placed on employment and economic development for any area of the Municipality. The Board is reluctant to interfere with the priority in the absence of firm evidence to the contrary."

The Board holds a similar view in the circumstances of this appeal.

While not a deciding factor, the Board has also considered the fact that Mr. MacLean is a permanent resident of Maple Street with his family. He would have a personal interest in such concerns as child safety, traffic control, unsightly premises and property values.

The Board feels that the area of the property subject to rezoning is of such a size to only permit Mr. MacLean's operation to continue in its present state. Any material increase in Mr. MacLean's operation on Maple Street would require an application to rezone additional lands. This is not a rezoning which would permit a large, uncontrollable industrial development to occur on the property to the possible detriment of the whole area of Scotchtown.

There was conflicting testimony from the various witnesses in relation to the concern for safety on Maple Street. Those opposing the application expressed a genuine concern for the safety of their children because of potential increased traffic volume and the lack of sidewalks. Those supporting the application expressed an equally genuine opinion that their children were safe.

There was equally conflicting testimony about the amount of traffic generated by the business which operates five vehicles. Obviously some felt it to be excessive and others not.

There was also opposing views in the testimony of the witnesses as to the extent, frequency, hours of operation, and noise level caused by the operation of the vehicles.

There was no traffic study or other statistical data presented to the Board in support of either argument. The Board must, therefore, consider which explanation it feels is most reasonable in the circumstances.

The Board tends to favour the view that as a minimum, the heavy trucks and equipment would leave in the morning, but would not likely return until the job was complete. It would be unlikely that such equipment would be in and out of the street frequently during a single day. Although there is no doubt that there would be some noise generated by the larger trucks, it is doubtful that this would occur on a daily basis.

The smaller trucks would likely leave in the morning and return at night with an occasional return during the day for supplies.

The Board notes that very few streets in most Municipalities have sidewalks installed, nor are many side roads paved. Residents of these areas are aware of this situation when they choose, for whatever reason, to live outside the limits of a city or town. While undoubtedly the side effects caused by this lack of services is increased by Mr. MacLean's operation, it is difficult to assess without any specific studies and also in light of the conflicting testimony of the witnesses.

No direct evidence was presented concerning any possible effect of the operation of the business on property values in the neighbourhood. Without such evidence it is difficult to project such effect. The Board is impressed by the fact that Mr. MacLean has a considerable investment in his own personal residence located on the street. He estimated the value to be $150,000.

Any problem associated with the burning of waste material on Mr. Maclean's property is a problem which must be addressed by the Fire Marshall for the Municipality. If there is any abuse of the fire regulations, it can be addressed at the Municipal level. Here again, there was conflicting testimony as to any possible abuse.

The Board has also placed some importance on the fact that the decision of Council was unanimous including the Councillor for the affected area who had originally expressed some reservations. This unanimous decision was made in spite of the opposition of the residents at both P.A.C. and Council.

By weighing all of the above considerations in their totality, the Board will draw the inference in this appeal, that the unanimous decision of Council was, itself, a strong indication of what is in the best interests of the Municipality.

Section 70(7) requires that "the Board shall not interfere with the decision unless the decision of Council is inconsistent with or unnecessary for the protection of the best interests of the Municipality".

For the above stated reasons, and regardless of the Board's own personal regard for the real concerns of the neighbours immediately adjacent to the subject property and other residents of the area, the Board believes that the decision of Council was not inconsistent with or unnecessary for the protection of the best interests of the Municipality. The Board can find no specific evidence sufficient to cause it to interfere with that decision.

The Board therefore dismisses the appeal and confirms the decision of Council.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 1st day of August, 1990.

MICHAEL G. JOHNSON
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

OLD EAST DEVELOPMENT CO. LTD. ET AL v. INVERNESS (COUNTY) AND FIRST CANADA INNS

PLANNING - L.U.B. AMENDMENT - REZONING R-1 TO C-1 TO PERMIT HOTEL - AGGRIEVED PERSON - POWER OF BOARD TO BROADEN HEARING - MUNICIPAL BOARD ACT, S. 12, 20, - PLANING ACT, S. 70.

The Applicant received approval to rezone land on Highway 104 in Port Hastings to Commercial to permit 75 unit-motor hotel. Adjacent property designated Commercial. The Appellants owned existing hotels in the Strait area. The Appellants raised both financial and environmental concerns but did not call expert evidence.

HELD: Appeal Dismissed.

Each of the Appellants had an interest in property which could be adversely affected financially by the proposed development. The Implementation Policy did not have any criteria dealing with financial impact on existing businesses. Financial considerations are a planning concern but not necessarily one which Council may rely upon as basis of its decision.

When parties are unrepresented the Board attempts to balance the proceedings. The Board generally requires the Appellant to produce sufficient evidence to establish a case. Environmental issues are arising more frequently in planning appeals. The Board believes consideration could be given to the possibility of broadening the scope of the hearing in future cases where parties raise sufficient concern that the Board might feel compelled to summon its own witnesses.

NSMB-7-90-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act by **OLD EAST DEVELOPMENT CO. LTD., CREIGNISH DEVELOPMENT LTD.,** and **DMJ HOLDINGS LTD.,** from a decision of the Council of the **MUNICIPALITY OF THE COUNTY OF INVERNESS** made the 13th day of March, 1990, which amended the L.U.B. to rezone property located on the north east side of Highway 104 in Port Hastings from Residential (R1) to Highway Commercial (C1) to permit a 75-unit motor hotel on the application of **FIRST CANADA INNS (ATLANTIC) LTD.**

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: KENZIE JONES for DMJ Holdings Ltd. and Old East Development Co. Ltd.,

DON MINGO, for Creignish Development Ltd.,

HAROLD MacISAAC, LL.B., for the Municipality of the Couinty of Inverness,

WAYNE CURRIE for First Canada Inns (Atlantic) Ltd.

HEARING DATE: July 5, 1990.

DECISION DATE: September 17, 1990.

DECISION: Appeal Dismissed.

DECISION

First Canada Inns (Atlantic) Ltd. wishes to build and operate a luxury budget motor hotel in Port Hastings. The site selected for the hotel is on Highway 104 adjacent to an A & W

Restaurant. The land is vacant and is zoned Residential (R1). The company applied to rezone it to Highway Commercial (C1).

On March 13, 1990, following a Public Hearing, County Council rezoned the land to Highway Commercial.

Old East Development Co. Ltd., DMJ Holdings Ltd. and Creignish Development Ltd. appealed Council's decision. Each of the three Appellant companies operates a motel or hotel in the Strait area. DMJ Holdings Ltd. operates the MacPuffin Motel which is located next to the A & W.

At the start of the hearing, the solicitor for the Municipality asked the Board to rule whether or not the Appellants are "aggrieved persons" within the meaning of Section 70 of the Planning Act. After hearing evidence, the Board found that each of the Appellants had an interest in property which could be adversely affected financially by the proposed development. The Board ruled that each Appellant was "an aggrieved person" within the meaning of Section 70(1)(a).

The Municipality argued that since Creignish Development Ltd. operates the Wandlyn Inn in Port Hawkesbury, and does not operate a hotel/motel in Port Hastings, it should not be granted status as an aggrieved person. The Board is satisfied that Creignish Development Ltd. is an aggrieved person for purposes of this appeal.

The Appellants presented two main arguments:

1) the economic impact of adding another motel to the Strait area will be detrimental to existing

motels/hotels;

2) The sewage treatment system as proposed is inadequate.

There is a Municipal Planning Strategy (M.P.S.) in effect for the Port Hastings Planning Area. Under the M.P.S. the subject property is designated on the Generalized Future Land Use Map (Gen. FLUM) as Residential. The adjoining property is designated Commercial. Implementation Policy 10-15/permits Council to consider rezoning areas immediately adjacent to a given land use designation on the Gen.FLUM without requiring an amendment to the M.P.S. provided that the intention of all other policies of the strategy are satisfied.

Policy 10-6 sets out the criteria for considering amendments to the Land Use By-law (L.U.B.) as follows:

> "In considering amendments to the Land Use By-law, in addition to all other criteria as set out in various policies of this Strategy, Council shall have regard to the following matters:
>
> a) That the proposal is in conformity with the intent of this Strategy and with the requirements of all other municipal by-laws and regulations;
>
> b) That the proposal is not premature or inappropriate by reason of:
>
> > i) the financial capability of the Municipality to absorb any costs relating to the development;
> >
> > ii) the adequacy of sewer services and utilities or if services are not provided, the adequacy of physical site conditions for private on-site sewer and water systems;
> >
> > iii) the adequacy and proximity of school, recreation, and any other community facilities;
> >
> > iv) the adequacy of road networks in, adjacent to,

or leading to the development; and

v) the potential for the contamination of watercourses or the creation of erosion or sedimentation;

c) The controls in the land use by-law reduce conflict with any other adjacent or nearby land use by reason of:

i) type of use;

ii) emissions including air and water pollutants and noises;

iii) height, bulk, and lot coverage of the proposed building;

iv) traffic generation, access to and egress from the site and parking;

v) open storage;

vi) signs; and

vii) similar matters of planning concern.

d) Suitability of the proposed site in terms of steepness of grades, and/or location of watercourses.

e) Suitable provision in the land use by-law for buffering, and access control to reduce potential incompatibility with adjacent land uses and traffic arteries."

Alan Downie, Development Officer for the Municipality, prepared a report reviewing the various criteria listed above. He recommended that Council hold a public hearing.

There is a Planning Advisory Committee (P.A.C.) for Port Hastings in addition to the Municipality's P.A.C. The Port Hastings P.A.C. considered the application and raised two concerns:

1. waste disposal;

2. access from the highway.

These matters were addressed by the Applicant.

The Municipality received letters from Provincial Government officials indicating approval of the proposal. The Municipal P.A.C. considered the application on January 23, 1990, and recommended approval.

Council held a Public Hearing on March 13, 1990. A number of area residents opposed the rezoning. Council also received a number of written submissions expressing opposition. The concerns raised were similar to those raised by the Appellants - the impact of the new development on existing hotels and motels and the adequacy of the proposed sewage treatment facility. The owners of residential properties across the road from the subject property raised concerns that their drinking water might be affected.

Immediately following the Public Hearing, Council held a meeting. During the meeting, Mr. MacIsaac, Solicitor for the Municipality, reviewed the criteria in the M.P.S. and explained the procedure for appealing Council's decision. A letter from an official of the Department of Environment indicating that a Joint Certificate for the sewage disposal system had been issued was read.

Council passed the following motion:

> "It was then moved by Councillor Lloyd Gillis, seconded by Councillor Wilbert Aucoin that knowing there is no objections with regard to the criteria as put forward by the people of Port Hastings, the application of First Canada Inns (Atlantic) Ltd., for rezoning be accepted".

Policy 10-6 does not have any criteria dealing with financial impact on existing businesses. Some municipalities do place limits on how close competing businesses may locate. In general, however, this type of financial consideration is not a planning criteria listed in a M.P.S. Financial considerations are, obviously, a planning concern. There is a financial impact on communities and individuals in almost any planning decision. They are very clear and major in this case. Having said that, the M.P.S. does not contemplate the competitive financial aspects of the proposal as a determinate concern of Council when making a decision to rezone.

Council, of course, does have a discretion and is not required to rezone every property that meets the criteria. In this case, Council has exercised its discretion in favour of the rezoning.

The Appellants have a legitimate concern about the impact of this development on the existing hotels/motels in the Strait area. Given the statistics presented at the hearing, one questions why tax incentives were granted for this proposal. Unfortunately for the Appellants, this is not the issue before the Board. The Board's function is to determine whether Council's decision to rezone the property can reasonably be said to carry out the intent of the municipal planning strategy.

In reviewing Policy 10-6, one of the criteria which raises concern is (b)(ii) dealing with sewage systems. The proposed sewage system is an underdrain sandfilter and chlorinator with a discharge line to Plaster Cove. The Appellants testified that their hotels/motels have a more elaborate sewage system. The

Appellants argued that the proposed sewage system is inadequate for the proposed number of units.

The Appellants submitted a chart from the Department of the Environment entitled Typical Water Uses. The chart shows that water usage for a hotel/motel would be at least 50 gallons per person per day. The proposed system is based on 60 gallons per unit per day. It is anticipated there will be two persons per unit staying in the motel. Mr. Mingo introduced evidence to show that the Wandlyn uses more water than 60 gallons per unit per day.

Officials from both the Department of Health and Fitness and the Department of the Environment approved the proposed design for sewage treatment which was based on 60 gallons per unit per day. Since the chart from the Department of Environment indicates that typical daily use would be at least 50 gallons per person or 100 gallons per unit, there appeared to be a discrepancy. As agreed by the parties the Board, following the hearing, wrote to both Departments to clarify whether the system was approved on the basis of 60 gallons per person or per unit.

David Shea, a Public Health Engineer with the Department of Health and Fitness, in a letter to the Board dated July 13, 1990, states as follows:

> "The design flow figure of 60 gal./unit/day was supplied by the designer of the sewage treatment facility. The designer is ultimately responsible for the design of the system, the figures are reviewed to determine if they are reasonable. In this case the designer was able to show that two (2) similar developments had a daily water consumption of 60 gal./unit/day. Charts give design flows of 40 to 150 gal./unit/day for motels. Since the proposed development will not contain a restaurant, pool or other such facilities an estimated flow of 60

> gal./unit/day for the facility is reasonable.
>
> If the designers were to err in estimating the water consumption or submit false data, there would be little long-term economic benefit to their client since an under-designed treatment facility would require upgrading. It is to the designers advantage to have a safety factor worked into the design."

Ms. M. Grant, an Environmental Engineer with the Department of the Environment in a letter to the Board dated July 12, 1990, states as follows:

> "In response to your letter of July 6, 1990, the selection of estimated design flows is a somewhat subjective process and estimated volumes differ between both reference books and design engineers.
>
> I have attached a copy of a table which lists quantities of waste water flow which has been taken from a Process Design Manual published by the U.S. Environmental Protection Agency. This table indicates that 60 U.S. gallons is an acceptable estimate per hotel room (two persons per room). It is also worth mentioning that 60 imperial gallons, which is what the underdrain sand filter was designed for, is equal to 72 U.S. gallons. The approval of 60 gallons per unit was not based on the assumption of one person per unit."

After reading both letters, the Board believes that Departmental officials were satisfied when they gave their approval that the system as expressed in gallons per unit per day was adequate.

Mr. Mingo also raised concerns about the chlorination aspect of the proposed sewage system as a possible carcinogen. He did not lead any evidence but referred to a phone call from someone at the Department of the Environment. The Board was not prepared to consider this issue without any expert evidence being presented. It was suggested that Mr. Mingo might pursue this matter further with the Department of the Environment.

Following the hearing, Mr. Mingo sent the Board a copy of a letter which he received from David Shea. The Board forwarded a copy of the letter to all parties and asked if they objected to the Board considering it. No objections were filed. The letter answers various questions which Mr. Mingo put to Mr. Shea in writing. One of these questions deals with the possibility of producing carcinogens from the proposed system. The answer reads as follows:

> "6. Will trihalomethanes be produced as a result of the chlorination process? Trihalomethanes are the by-product of the reaction between chlorine and humic materials in water. Chloroform and bromoform (trihalomethanes) are a Class II carcinogen probably carcinogenic to man (inadequate evidence in man but sufficient data in animals). Trihalomethanes are a concern in drinking water. Trihalomethanes which are formed as a result of chlorinated effluents from a sewage treatment facility, and discharged to a salt water environment are not considered to be a health problem."

Nearby residents are concerned the sewage treatment system will impact on the drinking water used in their homes which are directly across the highway from the subject property. Given Mr. Shea's comments about trihalomethanes in the drinking water, residents are right to question the adequacy of the proposed system. The system is designed to take the effluent from the treatment facility by pipe to Plaster Cove which is below the homes in question. Unless there was a problem, no effluent would seep into the drinking water. Officials of two departments of Government say the system is adequate. Without some contradictory evidence the Board cannot make an alternative finding. The Board finds that the proposal is not inappropriate by reason of the adequacy of sewage system or the physical site conditions.

The Board realizes that the proposed development may cause the existing hotels/motels financial difficulties and may result in the closure of one or two hotel/motels in the Strait area. While Council no doubt took the existing businesses' concerns into consideration, the decision to allow the rezoning is not in conflict with the M.P.S. The general goals of the M.P.S. is to encourage orderly growth and development in Port Hastings. It is also a goal "to maintain and enhance Port Hastings' position as a small tourist centre within the Strait of Canso region."

The subject property is immediately adjacent to an area designated Commercial on the Gen.FLUM. The designated area was zoned Residential with the intention that it could be considered for rezoning to Highway Commercial. Although the subject property is outside the designated area it is immediately adjacent to it. It does not appear unreasonable that it be rezoned Commercial.

The site plan for the hotel shows that it will be located close to the A & W Restaurant. The existing tree cover will remain to buffer the residential properties on the same side of the Highway.

The Board is satisfied that Council's decision can reasonably be said to carry out the intent of the municipal planning strategy.

During the hearing, some issues were raised by the Appellants without evidence being called. The Appellant companies were represented by individual officers. They had engaged the services of a lawyer but shortly before the hearing date, they chose to act without a lawyer. In most cases where the Appellant or other party is unrepresented, the Clerk of the Board will spend time advising individuals about the procedures followed in a hearing. In this case, there was no real opportunity to do so. In any event, it is not the function of the Clerk to advise persons regarding the necessity for producing evidence to support their case.

When parties are unrepresented the Board attempts to balance the proceedings. Although the Appellants did not produce expert evidence, they did lead evidence that brought into question the approval of the proposed sewage system.

The Appellants in their arguments suggested that the Board would and if not, should, obtain the necessary information before deciding the case.

Although the Planning Act provides for "appeals" to the Board, it does not define "appeal" nor does it establish a procedure to be followed on an appeal. In Miller v. Town of Truro (NSMB-34-89-P) February 9, 1990, (unreported) the Board at page 12 made the following comments:

> "The appeal procedure in planning matters...adopted by the Board can best be described as a hybrid. It is neither a straight appeal nor is it a hearing de novo. A record of Council's proceedings is made available to the Board in advance and then the parties are permitted to lead any additional relevant evidence."

The Board generally requires the Appellant to produce sufficient evidence to establish a case.

Section 20 of the Municipal Board Act gives the Board all the powers of a commissioner appointed under the Public Inquiries Act, R.S.N.S. 1989, c. 372. This includes the power to summon persons as witnesses requiring them to give evidence orally or in writing and to produce such documents and things as the Board or member deems "requisite to the full investigation of the matters into which he or they are appointed to inquire".

Section 12 of the Municipal Board Act provides that:

> "the Board may avail itself of the services of any officer or other employee of any board, commission or department of the Province, subject to the approval of the Minister or other person in charge...".

The Board has on occasion exercised its powers under sections 12 and 20 of the Municipal Board Act and required an employee of a department of the Province to testify. The Board has never interpreted its powers under the Public Inquiries Act to permit it to summons witnesses whenever a party in a planning matter raises an unanswered issue.

In recent years environmental issues are arising more frequently in planning appeals. Both Appellants and Interested Persons have raised issues of concern for which they are unable to produce expert witnesses because of the cost or their lack of knowledge.

The Board, following traditional practice, has not acted on such issues without evidence and has not required the Respondents to address the issue.

In this case, the Appellants raised concern that the proposed sewage system would produce carcinogens. Don Mingo testified that he had discussed the issue with an employee in the Department of Environment. He argued that the Board should pursue this issue further. The Board ruled that without expert evidence, it would not require the Municipality and the Applicant to deal with this issue. The Board at that time did not consider exercising its power under Section 20 of the Municipal Board Act. As noted earlier in the decision, the Board did eventually receive written evidence respecting carcinogens which it considered.

Mr. Mingo also forwarded other documents to the Board after the hearing. The Board felt that it could not consider them at that time.

During the hearing, the Board chose not to exercise its power and broaden the investigation. A full airing of the potential impact on the environment of the proposed sewage system might have answered some of the concerns of the residents.

The Board believes consideration could be given to the possibility of broadening the scope of the hearing in future cases where the situation warrants it. The Board does not mean to imply that everytime someone raises a potential environmental problem, it will broaden the hearing and call witnesses on its own. There will, however, be cases where the appellants or other parties raise sufficient concern that the Board will feel compelled to require additional witnesses.

As noted above the Board is satisfied that Council's decision can reasonably be said to carry out the intent of the municipal planning strategy.

The Board, therefore, dismisses the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 17th day of September, A.D., 1990.

LINDA D. GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

KAULBACK & ASSOC. LTD. v. BRIDGEWATER

PLANNING - DEVELOPMENT AGREEMENT - RESIDENTIAL - 4 UNIT BUILDING - PLANNING ACT S. 79.

The Applicant/Appellant wished to build a 4-unit apartment building which would be joined to an existing 2-unit converted residential home. Issue over whether development agreement was available or did it only apply to new dwellings on vacant lots.

HELD: Appeal allowed.

The Appellant's proposal exceeded the requirements of the as-of-right development and would require a development agreement. The proposed development is a new multi-unit use and is considered to be a new building which could be considered for a development agreement within the intent of the M.P.S. The character and stability of the residential neighbourhood will not be substantially altered by this particular development. It does not follow that because the Board has determined that one development meets the criteria of the M.P.S. and L.U.B. that all other similar developments would, by right, meet the criteria. A second or third development may substantially alter the character or stability of the neighbourhood or push the adequacy of sewer, water and street networks beyond their capability.

NSMB-9-90-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, R.S.N.S. 1989, c. 346, by **B.W. KAULBACK & ASSOCIATES LIMITED** from a decision of the Council of the **TOWN OF BRIDGEWATER** made April 23, 1990, which refused to enter into a development agreement to construct a multi-unit dwelling at 18 Alexandra Avenue, Bridgewater, Nova Scotia.

BEFORE: MICHAEL G. JOHNSON, Chairman.

COUNSEL: BRENTON W. KAULBACK, on behalf of the Appellant;

WILLIAM F. CLANCY, LL.B., on behalf of the Town of Bridgewater.

HEARING DATE: July 10, 1990.

DECISION DATE: October 22, 1990.

DECISION: Appeal Allowed.

DECISION

The Appellant company is the owner of property located at 18 Alexandra Avenue in the Town of Bridgewater. There is an existing building on the property which was recently converted from a single family dwelling to two residential units. Brenton W. Kaulback, President of the Appellant company, B.W. Kaulback &

Associates Limited, applied to the Town of Bridgewater for a development agreement to create four new residential units on the property.

The four new units would be constructed adjacent to the existing dwelling. The two structures would be connected by the construction of a deck at ground level covered by a roof. This deck would be approximately four feet wide at its narrowest part. The building area of the existing lot is approximately 1050 square feet. The new units will increase the building area by approximately 1100 square feet. The total floor area of the structures will increase from 1700 square feet to approximately 3200 square feet. The appearance of the new units would be in conformity with the design and structure of the existing units.

The property is located in a Residential (R-4) zone designated as the "Central Residential" area on the Generalized Future Land Use Map (G.FLUM).

The Lunenburg County District Planning Commission (Commission) prepared a report entitled "Development Agreement B.W. Kaulback: Multi-Unit Development" dated March 15, 1990. This report, recommending the development agreement, was prepared by Kurt Pyle, a planner for the Commission, but was presented to Council at its March 26, 1990, by Peter Oickle, the Director of Planning for the Commission. Mr. Oickle also presented eight terms to be included in the agreement. At this meeting Council authorized staff to hold a public participation meeting regarding the development (six in favour, one against).

The public participation meeting was held on April 12, 1990, with twelve persons in attendance. Included in the twelve were four members of Town staff, Mr. Kaulback and two Councillors. Mr. Oickle and Mr. Pyle reviewed the report of the Commission and draft development agreement.

The Minutes of the Meeting show that three main concerns were raised by those in attendance. They are as follows:

1. Proposed development is inappropriate in the context of the existing neighbourhood and is undesired.
2. Services - storm water and sanitary sewer.
3. Traffic safety and the number of cars.

At its meeting on April 23, 1990, Town Council defeated a motion to enter into the Development Agreement by a vote of four to three. The Minutes of the Meeting show that three Councillors indicated that their reason for the decision was that the "development was contrary to the intent of the Municipal Planning Strategy". One Councillor indicated that the reason was that the development proposed "does not constitute a new dwelling".

On May 14, 1990, the Board received a Notice of Appeal from this decision of Council.

Peter M. Oickle, Director of Planning for the Commission, testified on behalf of the Appellant. He stated that he was the drafter of the current Municipal Planning Strategy (M.P.S.). He reviewed his interpretations of various sections of the M.P.S. and the Land Use By-law (L.U.B.). This included references to portions of the preamble to residential policies and to Policy

4.1.1 and Policy 8.0 concerning implementation. He also referred to the provisions of Section 5.5 of the L.U.B. and various definitions included in Section 14. All of these policies and sections were discussed in the March 15, 1990, report of the Planning Commission.

Brenton W. Kaulback, President of the Appellant company gave a history of the development of the property. He outlined the details of the proposed development and how he believed they met the conditions of the M.P.S. and L.U.B. as interpreted by Mr. Oickle.

Mr. Clancy called John M. Hezeltine as an expert witness on behalf of the Town. Mr. Hezeltine expressed his opinions in opposition to Mr. Oickle with reference to many of the same sections of the M.P.S. and L.U.B.

Former Councillor, Ernest W. Bolivar and Councillor Mary Redden, testified in opposition to the development. In addition to stating their reasons for opposition, both stated their interpretation of various relevant sections of the M.P.S. Both witnesses were Councillors at the time of the adoption of the current M.P.S. Mr. Bolivar and Councillor Redden had attended the public participation meeting.

The Board held an evening session to allow members of the general public to testify. Five people appeared before the Board, all speaking in opposition to the development agreement. Three of these people had been in attendance at the public participation meeting. Many of the concerns raised before the Board were the same as recorded in the Minutes of this public meeting.

The Town argued that, in order for the policy on development agreements to apply, the proposed development must be for an entirely new dwelling located on a vacant lot. Any new development in the form of an addition to an existing building, beyond what is permitted as-of-right, could not be considered for a development agreement. Therefore the proposed development by the Appellant would not be within the intent of the M.P.S.

The Appellant argued that the proposed development constitutes a new dwelling or building and therefore eligible to be considered for a development agreement under the terms of the M.P.S.

The Board has reviewed the M.P.S. and the L.U.B. for the Town of Bridgewater in some detail. The preamble to the residential policies included in the M.P.S. includes the following paragraph which refers to the central residential area of the Town:

> "Within an area that is identified with the older, central residential area of the Town, defined generally as the area between York Street and Pleasant Street and extending from Maple Street to Wile's Brook, exclusive of the associated commercial districts, single unit, two unit, and multi-unit residential buildings co-exist in close proximity to each other. In this area, there are a large number of relatively large two-storey dwellings and many of these dwellings have been converted to two unit and multi-unit buildings. There is also a number of institutional buildings in this area that have become integrated with the residential uses. The mix of residential building types in this area of the Town as well as the relationship between the different types of residential uses and the various non-residential uses that are also present, distinguish the area from other residential districts. Council will, therefore, make provisions for this central residential area to develop as a mixed density residential neighbourhood in keeping with the existing character and development form. New

> single and two unit dwellings will be permitted as of right in these areas and existing buildings may be converted to a maximum of four apartments, subject to provision of parking for tenants and guests and limitations on expansion of buildings. New multi-unit buildings may be permitted in this central residential area by development agreement and the ceiling of four units on conversions and development agreement provisions will serve to maintain the character of the area and ensure that the quality of the living environment is not compromised."(emphasis added by the Board).

It is very clear from a reading of this paragraph that Council intended that provision be made in the Central Residential area so that it was possible for this area to develop as a mixed density residential neighbourhood provided that it was in keeping with its existing character. Provision for this development was provided in two ways. First by the conversion of existing properties with certain restrictions attached thereto and second by the use of development agreements to encourage new multi-unit buildings.

The intent expressed in this paragraph is carried out in policy 4.1.1. The first part of this policy sets up the central residential area and defines what development shall be permitted as-of-right within the designated area. It states as follows:

> "It shall be the policy of Town Council that the residential neighbourhoods that abut the Central Commercial area as designated under Policy 4.2.3., and that are associated with the older residential section of the Town, shall be designated as the "Central Residential" area as shown on Map 1, Generalized Future Land Use Map, and this area shall be zoned such that single unit dwellings, two unit dwellings, and converted multi-unit dwellings containing a maximum of four dwelling units, shall be permitted as of right subject to the requirements of the Land Use By-law. Within this area existing buildings containing in excess of four dwelling units shall be zoned according to the number of

> dwelling units that are located in them." (Emphasis added by the Board).

The designated areas of this "Central Residential" area are zoned Residential (R-4).

The residential requirements of the L.U.B. are detailed in Section 5.5. Section 5.5.1 details the permitted uses in a Residential (R-4) Zone. Section 5.5.1(b)(iii) states that:

> "Residential Conversions containing no more than four dwelling units according to the requirements of Section 4.27."

In order to avail oneself of this permitted use one must meet the requirements of Section 4.27 of the L.U.B. which deals with residential conversions and states as follows:

> "Where permitted in this By-law, conversion of existing buildings to dwellings containing more than one dwelling unit shall be subject to the following requirements:
>
> a) each dwelling unit shall be self-contained and shall have separate cooking and sanitary facilities;
>
> b) one off-street parking space shall be provided for each dwelling unit;
>
> c) exterior additions may increase the total floor area of the building by no more than 10% of total prior to conversion." (Emphasis added by the Board).

The foregoing references to M.P.S. policies and sections of the L.U.B. specifically show what may be done as of right within an R-4 Zone. Clearly the Appellant's proposal does not meet the requirements of an as-of-right development.

Mr. Clancy submits that where there is an existing building on a lot, no development can proceed beyond what is permitted as-of-right.

A second part of M.P.S. Policy 4.1.1 deals with new multi-unit uses permitted by development agreement and sets out the required criteria. It states as follows:

> "Within the designated Central Residential area and the corresponding residential zone, new multi-unit uses (containing 3 or more units) may be permitted by Development Agreement in accordance with the Planning Act, provided that the development proposal satisfies the following criteria: (Emphasis added by the Board).
>
> a) the maximum dwelling density shall not exceed sixty-two dwelling units per hectare;
>
> b) the architectural characteristics of the building or additions to any existing structures shall be compatible with residential buildings in the area, to the extent that the building shall have features that reflect the character of the residential neighbourhood as expressed in roof shape, proportioins and relationship of windows and doors and style of exterior siding;
>
> c) the development shall satisfy the parking requirements for multi-unit dwellings as set out in the Land Use By-law;
>
> d) appropriate screening of parking areas, driveways, and utility areas shall be provided to protect the privacy of any abutting low density residential uses;
>
> e) the proposed development shall not substantially alter the established character and stability of the residential neighbourhood."

Section 5.5.1(c) of the L.U.B. lists the uses permitted by development agreement in an (R-4) Zone. Paragraph (i) of that Section states as follows:

> "Construction and use of new dwellings containing three or more dwelling units in accordance with Municipal Planning Strategy Policy 4.1.1." (Emphasis added by the Board).

Mr. Clancy further submits that in order to avail oneself of a development permitted by development agreement the proposal must be an entirely new dwelling and constructed on a vacant lot.

The Board has reviewed in some detail the contradictory testimony of the two expert witnesses before it. Mr. Oickle's opinion is that the proposed development represents a new building or dwelling and therefore is permitted by development agreement per Policy 4.1.1. In Mr. Hezeltine's opinion the proposed development is an addition to an existing building. Therefore it would only be permitted to the extent of the as-of-right conversion to a ceiling of four dwelling units with a further restriction of no more than a 10% increase in total floor area.

While not in total agreement with all of his arguments, the Board prefers Mr. Oickle's opinion to that of Mr. Hezeltine in situations where the two conflict. Mr. Oickle was the drafter of the M.P.S. and is the Director of Planning for the Commission.

The Board has also reviewed the testimony of Mr. Bolivar and Councillor Redden, both of whom were present at the vote when the M.P.S. was originally adopted. Both witnesses are opposed to any development of the sort proposed within the central residential area. Both were in attendance at the public participation meeting. Councillor Redden stated that she had voted against the development agreement provisions included in the M.P.S. when it was adopted by Council. Both of these witnesses were of the opinion that development agreements would only apply to existing vacant land or land to be made vacant prior to construction. The Board, while understanding how this interpretation could be formed, does not agree with this interpretation.

Nowhere within the preambles or Policy 4.1.1 of the M.P.S. or within L.U.B. Section 5.5.1 can the Board find any reference to the development of vacant land for multi-unit development within the Central Residential area. The Board feels that had it been the intent of the M.P.S. that development agreements would be applied only to encourage the development of vacant lands within the central residential area, direct reference would have been made to this goal in the M.P.S. The absence of any such reference causes the Board some concern even though the Board does recognize that vacant land can be created by the demolition of existing structures.

Mr. Hezeltine stated that he felt there were a number of large areas of vacant land within the (R-4) area but he did not identify any specific location. The Board from its own view of the central residential area of the Town and a review of the G.FLUM and the zoning map included with the L.U.B. did not find any substantial tracts of vacant land which would be available for development of new multi-unit uses, buildings or dwellings by development agreement.

The Board also notes the wording of Policy 4.1.1(b) which states in part:

> "Architectural characteristics of the building or additions to any existing structures shall be compatible with residential buildings in the area...". (Emphasis added by the Board).

This section includes the use of the phrase "additions to any existing structures". This phrase is included in one of the five criteria which must be satisfied in order to have a development agreement for proposed developments for new multi-unit uses. If additions to existing structures were not intended to be considered for development agreement, the phrase would not be needed. The wording of the criteria could stand without it.

The Board did consider that this phrase could also refer to subsequent additions to dwellings previously constructed by development agreement. Such an addition would require an amendment to the original agreement. Such an amendment would be subject to the same criteria as the original agreement. The Board does not believe that the intent of this phrase would be confined solely to additions requiring amendments to a development agreement but would apply to all existing structures.

In addition to this review of Policy 4.1.1 the Board has reviewed the references in the M.P.S. and the L.U.B. to "new buildings", "new uses" and "new dwellings".

The wording of the M.P.S. and the L.U.B. leads to some considerable confusion in trying to interpret the intent of these policies and sections. The preamble to the M.P.S. policy uses the phrase "new multi-unit buildings". The policy itself states "new multi-unit uses (containing three or more units)". The L.U.B., when listing its permitted uses, uses the phrase "construction and use of new dwellings containing three or more dwelling units". The parties have interpreted these phrases to mean different things. Their testimony highlights this conflict.

The Board referred to the definition section of the L.U.B. for assistance with the following definitions:

> "BUILDING means a structure, whether permanent or temporary, which is roofed and which is used for the shelter or accommodation of persons, animals, materials or equipment and includes all additions, porches and decks attached thereto.
>
> DWELLING means a building, occupied or capable of being occupied as a home, residence or sleeping place by one or more persons, containing one or more dwelling units and shall not include a hotel, a motel or apartment hotel.
>
> DWELLING UNIT means one or more habitable rooms designed or intended for use by one or more individuals as an independent and separate housekeeping establishment in which separate kitchen and sanitary facilities are provided for the exclusive use of such individual or individuals, with a private entrance from outside the building or from a common hallway or stairway inside the building.
>
> STRUCTURE means anything that is erected, built, or constructed of parts joined togehter or any such erection fixed to or supported by the soil or by any other structure. A structure shall include buildings, walls and signs and also fences exceeding 2 metres (6ft) in height."

In the Board's opinion there is no question that the proposed development represents "new multi-unit uses (containing three or more units)" as stated in Policy 4.1.1 of the M.P.S.

From a reading of the definitions, it is also the Board's opinion that the proposed development is a building. It is also a dwelling containing more than one dwelling unit. The definition of dwelling basically restricts a building to residential uses. Any dwelling may contain one or more dwelling units by definition.

The question remains as to whether or not the proposal can be considered to be a new building or new dwelling within the intent of the M.P.S.

Any review of the criteria of Policy 4.1.1 and the considerations of Policy 8.0.4 for development agreements, must consider the whole proposal which in this case is for six units. In the Board's opinion it is not reasonable to consider such matters as density, architectural characteristics, parking, screening, effect on neighbourhood, town costs, sewer and water, site condition, pollution, storm drainage, facilities, traffic etc. by reference only to the proposed four new dwelling units. These matters must be considered in relationship to the whole proposal, i.e. six units in this case.

The Board has read the proposed development agreement and notes that the clauses contained therein relate to the total development and not just to the proposed four new units.

The Board also notes that the proposed development will more than double the building area of the lot and will increase the number of units from two to six.

The Board has reviewed the drawings of the proposed development. Although there is a clear distinction between the existing units and the new units, the two sections are connected both architecturally and physically by the use of a narrow decking joined both at the ground and the roof. The board determines that this proposed development represents one dwelling and is not in contravention of L.U.B. Section 4.16 which states:

> "More than one such dwelling may be built on a lot only where the lot has sufficient area and frontage to enable the lot to be subdivided into two or more lots which meet all applicable zone requirements and where the dwellings

> are located on the lot in such a way that new lots may be created around them which meet all applicable area, frontage, setback and yard requirements."

The Board is of the opinion that the proposed development would qualify as a new dwelling within the intent of the M.P.S. because, it can be considered as one dwelling, the component parts of the proposal cannot be considered in isolation and the project is of sufficient magnitude to substantially alter the existing property. It is considerably more than a conversion of an existing dwelling.

Mr. Clancy in his argument suggested that the Board should ignore the reference to new multi-unit uses contained in Policy 4.1.1 and use instead the reference to new dwellings as referred to in Section 5.5.1 of the L.U.B. He suggested that the Board can import the wording of the L.U.B. into the M.P.S. He referred the Board to Town of Kentville v. Laba et al (1988) 38 M.P.I.R. 170.

The Board has reviewed this decision of the Nova Scotia Supreme Court Appeal Division and does not find this direct an implication. The Board believes that this decision reaffirms the Board's position in previous decisions not to restrict its review of the intent of an M.P.S. solely to the consideration of its individual policies but to consideration of the entire M.P.S.

The Board has followed this procedure in the current case and has looked at all the relevant policies and preambles of the M.P.S. in making its determination.

Section 51(1) of the Planning Act requires that a L.U.B.

be adopted in order to implement the policies of the M.P.S. It is the M.P.S. which mandates and gives power to the L.U.B. While the wording of the L.U.B. can sometimes provide assistance in considering the intent of the M.P.S., in the final analysis, it is the intention of the M.P.S. which must govern.

The Board determines that the proposed development is a new multi-unit use which may be permitted by development agreement as provided in Policy 4.1.1 of the M.P.S. The project can also be considered a new dwelling within the intent of the M.P.S. as referred to in Section 5.5.1(c) of the L.U.B.

The Board must now determine if the proposed development satisfies the requirement of the M.P.S. for a development agreement.

The Board has reviewed the criteria for development agreements as detailed in Policy 4.1.1. The evidence before the Board shows that the proposed development satisfies all of the criteria with the possible exception of 4.1.1(e). This criteria states that:

> "The proposed development shall not substantially alter the established character and stability of the residential neighbourhood."

Many of the witnesses who testified in opposition to the development raised this point.

Councillor Redden stated in her testimony that she was not directly in opposition to Mr. Kaulback's specific development. She was in opposition to any such development within the neighbourhood. She felt that if this development were permitted it would open the opportunity for other developers to do the same thing. In her opinion both the proposed development and such continued development would substantially alter the character and stability of the neighbourhood.

The area residents expressed similar concerns.

From a view of the site, a review of the proposed plans and proposed development agreement and the other evidence, the Board is satisfied that the character and stability of the residential neighbourhood will not be substantially altered by this particular development.

Policy 8.0.4 of the M.P.S. details various matters that Town Council is to consider when entering into a development agreement which are as follows:

> "It shall be the policy of Town Council that when considering amendments to the Land Use By-law and in considering Development Agreements in addition to all other criteria as set out in the various policies of this Planning Strategy, Town Council shall consider the following:
>
> a) the proposal conforms to the intent of the Municipal Planning Strategy;
>
> b) the proposal conforms to the applicable requirements of all Town By-laws;
>
> c) the proposal is not premature or inappropriate due to:
>
> > i) financial ability of the Town to absorb costs related to the development;
> >
> > ii) adequacy of Town sewer and water services, including fire flows and water pressure and adequacy of other municipal services;
> >
> > iii) the adequacy of physical site conditions for on-site services;

> iv) creation or worsening of a pollution problem in the area such as but not limited to soil erosion and siltation of watercourses;
>
> v) adequacy of storm drainage and effects of alteration to drainage pattern;
>
> vi) adequacy and proximity of school, recreation, and other community facilities;
>
> vii) adequacy of street networks regarding congestion, traffic hazards and emergency access.
>
> d) suitability of the site regarding grades, soils, geological conditions, location of watercourses, flooding, marshes, bogs, swamps, and proximity to natural or man-made hazards or land uses that could present a health risk or result in a poor quality living environment."

Concerns were raised by opponents to the proposal concerning paragraphs c(v) and (vii). Beyond the raising of these concerns no specific facts or statistics were presented to the Board in connection with these two clauses.

Reference was made to these four considerations of Policy 8.0.4. in the Commission Report which stated in direct reference to this policy:

> "The proposed development satisfies all four criteria but Council should request the Town Engineer to verify the adequacy of the culvert, shown in Figure 4, to deal with storm water drainage: from the site and from the stream that flows up to the rear property line."

In the absence of any evidence to the contrary the Board accepts the testimony of Mr. Kaulback whose company is involved in architectural design and consulting. He stated that the proposed development will not increase the drainage problem in any manner to the neighbourhood and that the culverts and drainage systems included in the proposal (figure 4) are sufficient to meet the needs. The Board notes the planners were satisfied based on the drawings but suggested verification of the Town Engineer.

From the evidence before it and from its own view of the site the Board is satisfied that the traffic referred to in paragraph c(vi) is not a significant problem. The property is located on Alexandra Avenue very near to the intersection of Dufferin Street and in the Board's opinion should not cause any major traffic problem.

The Board is therefore satisfied that the proposal is not premature or inappropriate due to the considerations outlined in Policy 8.0.4(c) and meets the concern of (d).

Mr. Clancy suggested in argument that previous Board decisions have stated that if a Town Council is going to refuse a development agreement that is recommended by the planners then it should have good planning reasons. The planning reasons for Council's decision resulted from differences in interpretation of various sections. The Board has found that Council reached its decision on planning reasons which are no longer valid. Therefore Council no longer has good planning reasons, (which are known to the Board) to disagree with its planners.

The Board is conscious of the concerns of Councillor Redden and the others that once one development such as the one proposed is permitted within the (R-4) Zone, many others may follow. The Board notes that any such other developments would still have to be carried out by development agreement. It does not follow that because the Board has determined that one such development meets the criteria of the M.P.S. and conditions of the L.U.B. that all other similar developments would, by right, meet the criteria. A second or third development occurring within a neighbourhood may substantially alter the character or stability of the neighbourhood or push the adequacy of sewer, water and street networks beyond their capability or contravene other criteria. With the use of development agreements Council still maintains its discretion to approve or reject future development proposals within the (R-4) Zone proceeding on proper planning principles.

In summary the Board has determined that the proposed development:

1. may be permitted by development agreement as it
    a) is a new multi-use per M.P.S. Policy 4.1.1;
    b) can be considered a new dwelling within the intent of the M.P.S. (L.U.B. 5.5.1(c)).
2. Satisfies all the requirements of the M.P.S. for a development agreement.

Section 79(4) of the Planning Act requires that the Board not interfere with the decision of Council unless the decision cannot reasonably be said to be consistent with the intent of the M.P.S.

The reason for refusal stated by three of the Councillors was that the proposed development was contrary to the intent of the M.P.S. Councillor Redden was one of these and stated directly in her testimony that her specific objection was that the proposed development did not constitute a new building and therefore was not eligible for a development agreement. This was the reason stated by the other Councillor who voted against entering into the agreement.

The Board was not made aware of any specifics of the proposed development which the Councillors felt were contrary to the M.P.S. or to which policies they felt they were contrary. The Board has found none on its own and has found that the proposed development was within the intent of the M.P.S.

As to the second stated reason for refusal the Board has already determined that the proposed development does constitute a new dwelling and is eligible for a development agreement.

The Board determines that the decision of Council not to enter into the agreement cannot reasonably be said to be consistent with the intent of the M.P.S. as required by Section 79(4) of the Planning Act.

The Board allows the appeal and refers the matter back to Council as directed by Section 79(4)(a) of the Planning Act.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 22nd day of October, A.D., 1990.

MICHAEL G. JOHNSON,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

PARSONS INVESTMENTS LTD. v. BARRINGTON

PLANNING - L.U.B. AMENDMENT - REFUSAL TO AMEND BEVERAGE ROOMS - INTENT OF M.P.S. - PLANNING ACT - S. 70.

Appellant wished to establish a beverage room in its shopping plaza located in the Commercial Highway (C-2) Zone. Abutting properties are R-1. Appellant applied to amend the L.U.B. to include beverage rooms in C-2 Zones.

HELD: Appeal dismissed.

In the Board's opinion the establishment of a beverage room such as the one currently proposed would not, at the suggested location, be incompatible. There are, however, many areas currently zoned C-2 to which the establishment of a beverage room would be totally outside the intent of the goals, objectives and policies of the M.P.S. The establishment of such a facility would not protect residential resources from incompatible land uses, would not minimize land use conflict and would detrimentally affect abutting residential uses.

NSMB-14-90-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, R.S.N.S. 1989, c. 346, by **PARSONS INVESTMENTS LIMITED** from a decision of the Council of the **MUNICIPALITY OF THE DISTRICT OF BARRINGTON** made June 27, 1990, which refused to approve an amendment of the Land Use By-law to allow beverage rooms as a permitted use in a Commercial Highway (C-2) Zone.

BEFORE: MICHAEL G. JOHNSON, Chairman.

COUNSEL: JOHANNE TOURNIER, LL.B., on behalf of the Appellant;

DONALD HARDING, LL.B., on behalf of the Municipality of the District of Barrington;

HEARING DATE: October 4, 1990.

DECISION DATE: November 8, 1990.

DECISION: Appeal Dismissed.

DECISION

The Appellant company is the developer and owner of Barrington Plaza which is a multiple-use commercial building located on Highway No. 3 in Barrington Passage. The company, in partnership with Garvin F. Symonds, proposes to establish a beverage room in this shopping plaza. Currently located in the plaza is a pharmacy, a Sears outlet, a flower shop and a hairdresser. The total area of the plaza is approximately 23,000 square feet and the proposed beverage room would occupy approximately 1700 square feet. The beverage room would not be evident from the road and parking for customers would be at the rear of the plaza. The plaza is located in a Commercial Highway (C-2) Zone. The abutting properties are zoned Residential (R-1).

On June 6, 1990, the Appellants applied to have the Land Use By-law (L.U.B.) amended to include a beverage room as a permitted use in a Commercial Highway (C-2) Zone.

Gary S. Saunders, a Planner for the Yarmouth-Argyle-Barrington District Planning Commission (Commission) had recommended approval of the amendment. The Planning Advisory Committee (P.A.C.), on June 19, 1990, also recommended to Council that the amendment be approved. Council at its June 27, 1990, meeting refused the amendment. Notice of Appeal of this decision of Council was received by the Board on July 10, 1990.

In 1989, Mr. Symonds, acting on his own behalf, had made application to include "pubs" as a use permitted in a Commercial Highway (C-2) Zone. In connection with this original application Gary Saunders had prepared a report on behalf of the Commission, dated December 19, 1989. The relevant issues included in this report were all reconsidered by Mr. Saunders and the original report was resubmitted for the current appeal.

P.A.C. had recommended denial of Mr. Symonds'original application. When Council first considered this application it asked P.A.C. to further study and consider the amendment. P.A.C. was requested to prepare an amendment which would restrict the establishment of a tavern to specific properties instead of being permitted to locate on any C-2 Zone property. P.A.C. recommended a proposed amendment to Council which would permit a tavern in a C-2 Zone provided it was located within a group of commercial buildings, shopping centres, plazas or strip malls subject to certain parking requirements. Council turned down this recommendation and refused the application. No appeal was made by Mr. Symonds in respect to this decision of Council.

Throughout the hearing the terms "beverage room", "pub" and "tavern" were frequently used by the parties and witnesses. The Board understands that for liquor licensing purposes the terms may have slightly different meanings. For the purposes of this Appeal, the Board has accepted all references as being synonymous.

Raymond J. Parsons, owner of Parsons Investments Limited, reviewed his involvement in the proposed beverage room since Council's refusal of Mr. Symonds' original application. He reviewed the lay-out of the shopping plaza, its location in the community and the estimated costs of the proposed beverage room and its location in the Plaza.

Garvin Symonds was acting as agent for Parsons Investments Limited for this application and is a partner in the proposed beverage room. He reviewed his work experience, involvement in the project and plans for its development and methods of operation. He also stated some of the benefits that he saw from such a development.

Gloria Ashley, Manager and Bookkeeper of the Victoria Hotel/Motel, testified in favour of the proposal. The Victoria Hotel had been the subject of a previous appeal to the Board in *Victoria Hotel/Motel (1986) Ltd.* v. *Town of Barrington* (1989) 8-B M.B.D. 369. This appeal involved an amendment to the L.U.B. to permit a lounge as an accessory use to a hotel/motel in the Central Business District (C-1) Zone.

Gary Saunders reviewed the report of the Commission stating in some detail his reasons for recommending the proposed amendment. He cited the various relevant sections of the M.P.S. and the L.U.B. He reviewed his interpretation of these sections and how he felt they relate to the proposed amendment.

Jack Fry, the Clerk/Treasurer of the Municipality of the District of Barrington for the past 26 years, testified on behalf of the Municipality. He reviewed the process followed in the preparation of the M.P.S. leading to its final adoption in 1985. He stated that the inclusion of beverage rooms and lounges in the list of permitted uses in the C-1 and C-2 Zones had been discussed at the time of the preparation of the M.P.S. He also stated that the view of the P.A.C. at that time was that the matter of such establishments was best left unsaid and unsolved for the time-being. It was his opinion that the whole adoption of the M.P.S. would be subject to major opposition if beverage rooms and lounges were included as permitted uses at that time. He reviewed his interpretations of the relevant sections of the M.P.S. and stated his reasons why he felt Council's decision was within the intent of the M.P.S.

One of Mr. Fry's main concerns was that there was no distinction in the proposed amendment between the various C-2 Zones as listed on the zoning maps. The original intent of the Commercial Highway (C-2) Zone was that it center around the intersection of Highway 3 and the road to the causeway to Cape Sable Island. Other commercial establishments located along Highway No. 3, which were in existence when the M.P.S. was adopted, were also spot zoned as C-2 at the same time. Barrington Plaza is located in one of these spot C-2 zonings. If the amendment were approved as it was applied for, a beverage room could be located in any one of these spot C-2 zoning areas. He felt that this would not be the intent of the M.P.S.

Councillor Freeman Stoddart and Councillor Etheren Goreham testified in opposition to the proposed amendment. They reviewed their various objections to the proposed amendments. Both Councillors expressed concern as to the generic aspects of the proposed amendment whereby it would apply to all C-2 Zones within the Municipality.

At the evening session Deputy Warden Kent Blades, Edward Allen, Moyle Crowell, Claris Hill, Kirby Nickerson and Judy Hitchens all spoke in opposition to the proposed amendment. In addition to the concern that a beverage room would not be compatible to all areas zoned C-2 the witnesses stated many other reasons for their opposition. These reasons included incompatibility with residential aspects of abutting property, traffic on a main highway, location of schools near C-2 zones and the possibility of drinking and driving. Witnesses expressed strong feelings against the use and abuse of alcoholic beverages. These feelings were frequently based on strong religious convictions.

Moyle Crowell and Claris Hill stated they were representing the pastors and members of the congregation of their churches (48 members and 46 members respectively).

Barry Crowell, Lottie Atkinson, Caroline Strange and Manuel Symonds all spoke in favour of the amendment. Their reasons for doing so included the fact that Shelburne and Yarmouth were too far for residents of Barrington to go to get a drink, location in the local area would reduce drinking and driving, promotion of employment, keep young people in the area, provide growth to Barrington and the possible creation of a taxi service for the entire area.

Barry Crowell presented a petition containing in excess of one hundred names in favour of the application.

The Appellants have made application to the Municipality to amend the Land Use By-law to include a beverage room as a permitted use within a C-2 Zone. Therefore the details of the proposed beverage room and its location are not directly relevant to the consideration of this amendment even though much of the evidence referred to it. While recognizing this, the Board feels it would still be useful to examine the relevant policies of the

M.P.S. in relation to the specifics of this proposal.

At the beginning of the M.P.S. there is a Section stating the goals and objectives against which the intentions of the M.P.S. can be assessed. The economic development goal is "to encourage the economic growth of the industrial, commercial and tourism sectors in order to maximize employment opportunities and related benefits for the residents".

The first objective listed with this goal is "to promote the development and expansion of commercial enterprises so as to best serve the residents of the municipality".

Policy A-2 establishes the various land use designations which includes Commercial Highway "to accommodate highway oriented commercial uses including other compatible uses".

The commercial development section of the M.P.S. contains the following policies which relate to Commercial Highway (C-2) zones:

> "C-27 It shall be the intention of Council to permit the expansion of existing commercial and business uses and the establishment of such new uses in areas immediately adjacent the Central Business District designation only by amendment to the Land Use By-law subject to the following criteria:
>
> a) that traffic noise and headlight glare does not cause nuisance effects upon abutting residential uses in the adjacent Residential General designation;
>
> b) that the development conforms with all relevant criteria of Policy H-6 in the Implementation chapter.
>
> C-28 Within the Commercial Highway designation shown on Map 7, it shall be the intention of Council to guide future development by establishing in the Land Use By-law a Commercial Highway (C-2) Zone to accommodate highway

oriented commercial uses, other business activities and existing residential uses identified in Schedule "F" of the Land Use By-law.

C-29 It shall be the intention of Council to zone as Commercial Highway (C-2) all lands within the Commercial Highway designation to permit the expansion of existing commercial uses and the establishment of such new uses.

C-30 It shall be the intention of Council to permit the expansion of existing commercial and business uses and the establishment of such new uses in areas immediately adjacent the Commercial Highway designation only by amendment to the Land Use By-law subject to the criteria of Policy C-27."

The Board also reviewed the amending criteria listed in Implementation Policy H-8 which states:

"In considering amendments to the Land Use By-law, in addition to all the other criteria set out in the various policies of this Strategy, Council shall have regard to the following criteria:

a) that the proposal is in conformance with the intentions of this Strategy and with the requirements of all other municipal by-laws and regulations;

b) that the proposal is not premature or inappropriate by reason of:

i) the financial capability of the Municipality to absorb any costs relating to the development;

ii) the adequacy and proximity of schools, recreation and any other community facilities;

iii) the adequacy of road networks in, adjacent to, or leading to the development.

iv) creating a negative impact upon the natural resource base.

c) suitability of the proposed site in terms of steepness of grades, soils and geological conditions, location of watercourses and the proximity of highway ramps, and other nuisance factors.

In addition to a review of the policies of the M.P.S. the Board considered the opposition of the residents to the proposal. It also considered the comment of Mr. Fry regarding the omission of beverage rooms from the permitted use list at the time the M.P.S. was adopted. Opposition to alcoholic beverages based on religious beliefs and the exclusion of certain activities from permitted uses within commercial zones was discussed to great lengths in the Victoria Hotel/Motel decision and need not be repeated here.

As well, the Board reviewed the details of the report of the Commission. Gary Saunders concludes this report with the following paragraph:

> "A pub is a commercial use offering a service to the public. Aside from its hours of operation, this use has similar requirements respecting parking, access, lighting and signage as other commercial uses. As well the intensity of such use, that is to say, the activity which it generates would not likely be greater than other commercial uses that are presently permitted within the C-2 Zone or which may be accommodated by development agreement within the R-1 Zone. Given these facts and in respect of all general and economic goals and objectives and those policies pertaining to commercial development in the Rural Centre, a pub is not an incompatible use within Highway Commercial (C-2) Zone. Therefore, it is the recommendation of staff that the Highway Commercial (C-2) Zone list of uses permitted be amended to include "Pubs"."

If the Board's consideration were limited solely to the proposed development in the Barrington Plaza, the Board would be in agreement with the conclusion and recommendations of Mr. Saunders. The Board believes that the proposed beverage room, at its suggested location, is in keeping with the goal of economic growth of the commercial sector and the objective to promote development and expansion to serve the residents of Barrington. Such a development would fall within the intent of Policies C-28, C-29 and C-30. It would also meet the criteria listed in Policy C-27 and H-6.

However, the Board cannot confine its considerations to such a limited scale because as already noted the application was for the addition of "beverage room" as a permitted use within the total C-2 Zone.

When considering the amendment, as it was applied for, other areas of the M.P.S. should be noted in addition to these already reviewed. The general development goal of the M.P.S. is "to secure a high quality living environment for all residents by ensuring that future development in the Municipality is harmoniously integrated within the context of both the man-made and natural environment.

The second objective listed in this goal is "to protect residential, commercial, industrial development and the natural resources of the municipality from the encroachment of incompatible land use activities."

The last sentence of the preamble to the commercial development section of the M.P.S. states that:

> "The Council should also establish such other policies as are necessary to regulate development within these areas and minimize the potential for land use conflict with residential development."

Policy C-31 of the M.P.S. deals with existing commercial uses within residential areas. The Policy and its preamble are as follows:

> "With respect to existing commercial uses within the Residential General designation in the Corridor area, Council should zone such uses as Commercial Highway and to permit future expansion only by amendment to the Land Use By-law. Council should also establish special requirements in the By-law to ensure that any expansion does not detrimentally effect abutting residential or institutional uses. (emphasis added by Board).
>
> C-31 In recognition of existing commercial uses outside the Central Business District and Commercial Highway designation in the Barrington-Barrington Passage Corridor, it shall be the intention of Council to zone such uses as Commercial Highway (C-2) for purposes of conformity and to permit their expansion beyond their established zone boundary only by amendment to the Land Use By-law subject to the criteria of Policy C-27."

In the Board's opinion the establishment of a beverage room such as the one currently proposed would not, at the suggested location, be incompatible with these additional references to the M.P.S.

However, it is also the Board's opinion that there are many areas currently zoned C-2 to which the establishment of a beverage room would be totally outside the intent of the goals, objectives and policies of the M.P.S.

The establishment of such a facility in these areas would not protect the residential resources from incompatible land use activities. It would not minimize land use conflict with residential development and it would detrimentally effect abutting residential uses. In many of these areas such a development would not meet the economic development objective to best serve the residents nor would it necessarily meet all the criteria of policies C-27 and H-6.

Therefore, the all-inclusive amendment requested by the Appellants cannot be considered to be within the intent of the M.P.S.

Section 70(5) of the Planning Act states:

"The Board may

> a) confirm the decision of the council;
>
> b) allow the appeal by reversing the decision of the council amending the land-use by-law; or
>
> c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board".

The Appellants requested that if the Board were not able to allow the amendment as originally applied for that it still allow the appeal by instructing Council to amend the By-law in a restricted manner similar to that approved by the P.A.C. for the original application of Mr. Symonds. Counsel cited Section 70(5)(c) as authority for the Board to do so.

The Board is unable to do so because of the restriction imposed upon it by Section 70(6) of the Planning Act which states:

> "The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

The Board has determined that the amendment, as applied for, was not within the intent of the M.P.S. Therefore the decision of Council in refusing the amendment must reasonably carry out the intent of the M.P.S. and the Board cannot allow the appeal.

As provided by Section 70(5)(a) the Board confirms the decision of Council and dismisses the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 8th day of November, A.D., 1990.

MICHAEL G. JOHNSON,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

MEHTA & NYDA ENTERPRISES v. TOWN OF TRURO

PLANNING - NON-CONFORMING USE v. ILLEGAL USE - DEVELOPMENT PERMIT - REFUSAL TO ISSUE TO PERMIT REPAIRS TO THREE APARTMENT BUILDINGS - PLANNING ACT, S. 90.

The Appellants built three buildings in the 1970's each intended as a triplex. At some point after construction they were each converted without a permit. At various times "cease occupancy" orders were issued for each building. Appellants in 1990 applied for development permits which were refused on basis that current use is illegal. Appellants argued that it was a non-conforming use.

HELD: Appeal dismissed.

A non-conforming use is a use which was legal at the time it was commenced but has become non-conforming due to the introduction of or an amendment to a L.U.B. An illegal use is a use which now and during its history has always violated the planning provisions relating to it.

The object of a non-conforming use section in a planning statute is to permit an existing lawful use to continue even though the current zoning would prohibit it. The Board cannot interpret Section 90(1) to mean that an illegal use becomes a valid use merely because the zoning was changed.

None of the properties, as then and now being used, would have qualified as non-conforming uses since they were not lawfully in existence.

NOTE: Leave to appeal to the Nova Scotia Supreme Court, Appeal Division, granted. The appeal was dismissed.

NSMB-21-90-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act by **DR. NAVIN M. MEHTA** and **NYDA ENTERPRISES** from a decision made by **PETER NELSON, DEVELOPMENT OFFICER** for the **TOWN OF TRURO**, on July 18, 1990, which refused to issue development permits for 116-120 McLean Street (otherwise known as 118 McLean Street), 123 McLean Street and 124 McLean Street.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: DR. NAVIN M. MEHTA, for himself and the other Appellant;

JOHN AKERMAN, Q.C., and GARY RICHARD, LL.B. for the Development Officer.

HEARING DATE: October 16, 1990.

BRIEFS SUBMITTED: October 22nd, 1990 by the Appellants;

November 7th, 1990 by the Development Officer.

DECISION DATE: November 9, 1990.

DECISION: Appeal Dismissed.

DECISION

Dr. Navin Mehta and Nyda Enterprises Ltd., the Appellants, own several buildings in the Town of Truro. Dr. Mehta is the principal shareholder and President of Nyda Enterprises Ltd.

On September 21, 1973, Dr. Mehta applied to the Town of Truro for a building permit to construct a triplex at 118 McLean Street. This property is also known as 116-120 McLean Street. The Building Inspector on September 21, 1973 issued Nyda Enterprises Ltd. a permit to construct a building at 118 McLean Street. The permit states that the building is "intended to be used as a triplex".

Nyda Enterprises Ltd. constructed a triplex at 118 McLean St. Shortly after construction, the company converted the building to six units. No permit was applied for or issued for the conversion. Nyda Enterprises Ltd. has continued to use the building as a six-unit building.

On March 25, 1975, Dr. Mehta applied for building permits for 123 and 124 McLean Street. On each application the purpose of the building is listed as "triplex". The Building Inspector issued a permit to construct a building for each property on March 27, 1975. The permit for 123 McLean Street does not specify what is intended to be used for. The permit for 124 McLean states that it is "intended to be used as a apts.".

Dr. Mehta constructed both buildings to be used as either three or four units. Except for some periods of vacancy both buildings have been used mainly as four units. No permit was applied for or issued for the conversion from three to four units. Both buildings are owned by Dr. Mehta.

According to the evidence presented, there have been many complaints over the years about these three properties. Most of the other homes in the immediate area are single family homes. The area residents in a petition given to the Board made the following comments:

> "the buildings have never been properly maintained. There is no regular schedule for mowing, snow removal or proper garbage disposal. In the case of 116-120 McLean Street there is no landscaping whatsoever."

On January 9, 1986, Peter Nelson, as Building Inspector issued a Notice to remedy unsafe conditions at 123 McLean Street. When this Notice was not complied with a Cease Occupancy Order was issued.

On April 27, 1987 Dr. Mehta was advised by letter that a Cease Occupancy Order would issue for 124 McLean Street unless certain repairs were done. It appears that Dr. Mehta did not comply.

Eventually Cease Occupancy Orders were issued for 118, 123 and 124 McLean Street and these remain in effect. In addition to the Cease Occupancy Orders, complaints about unsightly premises were made from time to time. These complaints were resolved.

In early December, 1989, Dr. Mehta entered into an arrangement with Gerald Thibeault. Mr. Thibeault was to manage the three properties and an additional property at 130 McLean Street. Mr. Thibeault had an option to purchase the properties.

Dr. Mehta introduced a letter dated December 6, 1989, addressed to Gerald Thibeault from Ken MacLeod, Building Inspector for the Town. The letter outlines the matters which had to be dealt with before the Cease Occupancy Orders on each property would be lifted. The first requirement listed is to obtain a building permit.

The Town issues both building permits and development permits. According to section 3.3 of the Land Use By-law (L.U.B.) a development permit is required before any development is undertaken. Development is defined in the L.U.B. to include "any ... construction, addition, alteration or replacement ... to any building". The renovations required for 118, 123 and 124 McLean Street are substantial. It was detemined that development permits were required.

The Town's files show that Gerald Thibeault on December 8, 1989, applied for building permits and development permits for 118, 123, 124 and 130 McLean Street. With the exception of 130 McLean Street the permits were all refused.

There is a fifteen-day appeal period from a refusal to issue a development permit. Dr. Mehta was away and no appeals were filed. Dr. Mehta then instructed Mr. Thibeault to make new applications for development permits.

On June 28, 1990, Mr. Thibeault applied for development permits for 118, 123 and 124 McLean Street. He also filed 3 affidavits from Dr. Mehta which outlined the number of dwelling units in each building - 6 in 118 McLean, 4 each in 123 and 124 McLean.

By letters dated July 18, 1990, Peter Nelson, as Development Officer for the Town, refused to issue the development permits. Each letter contains the same reason for refusal as follows:

> "The information contained in this affidavit indicates that the current use of the building is illegal and not in compliance with the original building permit issued".

Dr. Mehta and Nyda Enterprises Ltd. served a Notice of Appeal on the Board on August 3, 1990, respecting all three properties.

Section 85(1) of the Planning Act provides for an appeal by the applicant. Gerald Thibeault is identified on each application for a development permit as the owner of the property. The letters refusing to issue the development permits were addressed to Mr. Thibeault. At the start of the hearing, the Board ruled that Mr. Thibeault was acting as an undisclosed agent for Dr. Mehta and Nyda and allowed the appeal to proceed. Mr. Thibeault no longer manages the properties. He was not called as a witness.

The current L.U.B. zones the three properties as Residential Two Family (R-2) Zone. This zone does not permit triplexes or four or six-unit apartment buildings.

At the time of construction, the 1959 Zoning By-law as amended in March, 1965, was in effect. McLean Street was zoned RD - Residential Development District. Among the various permitted uses was "Multiple dwellings". The 1965 amendments to the Zoning By-law placed lot size restrictions on the number of units in a multiple dwelling as follows:

"1(a) Size of Lot

No multiple dwelling nor apartment house shall be erected

> on a lot provided, containing less than 7500 sq. ft. of surface area for two units, plus an additional 1740 sq. ft. of surface area for each additional two-bedroom unit or 1175 sq. ft. of surface area for each additional one bedroom unit."

Using the figures for a one-bedroom unit, results in the following lot size requirements:

Triplex - 8,675 sq. ft.
4 units - 9,850 sq. ft.
6 units - 12,200 sq. ft.

The lot sizes of the three properties are:

118 McLean Street - 8,900 sq. ft.
123 McLean Street - 9,000 sq. ft.
124 McLean Street - 12,000 sq. ft.

Neither 118 or 123 McLean Street is a large enough lot to permit more than three units. The lot at 124 McLean is large enough for four units.

Dr. Mehta testified that after 118 McLean Street was constructed, his family members felt that it would be easier to rent six units than three and that is why Nyda Enterprises Ltd. converted the building.

Dr. Mehta testified that the design of 123 and 124 McLean Street was for 4 units. When asked by the Board, why he had not applied for permits to build 4-unit buildings, he was unable to given an explanation.

Sections 90 to 94 of the Planning Act permit non-conforming uses to continue to exist and to be renovated if certain conditions are met.

The issue in this appeal is whether the buildings which were converted without a permit to 4 or 6 units are non-conforming uses or illegal uses.

Black's Law Dictionary, 5th edition, defines "non-conforming use" as follows:

> "A structure the size, dimension or location of which was lawful prior to the adoption, revision or amendment of a zoning ordinance, but which fails to conform to the requirements of the zoning district in which it is located by reasons of such adoption, revision or amendment. A use which does not comply with present zoning provisions but which existed lawfully and was created in good faith prior to the enactment of the zoning provision.

Rogers, Canadian Law of Planning and Zoning at page 210.14 states the following:

> "A non-conforming use is a use for which a building or land is lawfully occupied at the time a restricted area by-law becomes effective but which does not comply with the zoning regulations of the by-law applying to the district in which it is located."

A non-conforming use is a use which was legal at the time it was constructed but has become non-conforming due to the introduction of or an amendment to an L.U.B. A non-conforming use is thus distinguished from an illegal use. An illegal use is a use which now and during its history has always violated the planning provisions relating to it.

Dr. Mehta argues that the Planning Act does not distinguish between non-conforming uses and illegal uses. He points to differences between the 1969 Planning Act and the current Planning Act.

Section 45(1) of the 1969 Planning Act states as follows:

> "Subject to the provisions of this Act, a building or structure, or use of land, buildings or structures lawfully in existence at the date of the first publication of notice of intention to pass a zoning by-law or any by-law amending or revising the zoning by-law

> and which does not conform to such by-law, may continue to exist."

Section 90(1) of the Planning Act, R.S.N.S. 1989, c. 346, states as follows:

> "Subject to this Act, a non-conforming structure or a non-conforming use of land or a structure, existing at the date of the first publication of the notice of intention to adopt a land-use by-law or amend a land-use by-law, may continue to exist."

Dr. Mehta relies on the fact that the word "lawfully" in section 45(1) has been deleted from the wording of section 90(1). It is his contention that any existing use which does not conform to an amended land-use by-law is therefore a non-conforming use regardless of whether or not it was formerly a lawful use.

Subsection (2) of Section 90 provides a deeming provision and states as follows:

> "For the purposes of subsection (1), a non-conforming structure or a non-conforming use of land or a structure shall be deemed to be existing if:
>
> a) the non-conforming structure, or structure containing the non-conforming use, was lawfully under construction; or
>
> b) the permit for its construction or use was in force and effect, except that this clause shall not apply unless the construction or use is commenced within twelve months after the date of the issuance of the permit and is completed in conformity with the permit within a reasonable time."

The section makes a reference to a permit for construction or being lawfully under construction.

Section 9(5) of the Interpretation Act, R.S.N.S. 1989, c. 235, sets out specific matters which are to be considered in interpreting a statute. The section reads as follows:

> "Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> a) the occasion and necessity for the enactment;
>
> b) the circumstances existing at the time it was passed;
>
> c) the mischief to be remedied;
>
> d) the object to be attained;
>
> e) the former law, including other enactments upon the same or similar subjects;
>
> f) the consequences of a particular interpretation; and
>
> g) the history of legislation on the subject."

The current Planning Act followed a review of the legislation by the Planning Act Review Committee. The Final Report and Recommendation of the Committee was issued in November 1981. The Report contains a section on non-conforming use. Among the Committee's recommendations dealing with non-conforming uses are the following two:

> 1."That the Planning Act define a "non-conforming building" as a building
>
> i) that is lawfully constructed or lawfully under construction on the date that a zoning by-law or amendment affecting the building or the land on which the building is situated comes into effect, and
>
> ii) that on the date the zoning by-olaw or amendment comes into effect, does not, or when construction is completed, will not, conform to the by-law."
>
> 2." That the Planning Act define a "non-conforming use" as a lawful specific use
>
> i) being made of land or a building or intended to be made of a building lawfully under construction, on the

> date that a zoning by-law or amendment affecting the land or building comes into effect, and
>
> ii) that on the date the zoning by-law or amendment comes into effect does not, or in the case of a building under construction will not, conform with the zoning by-law.

These recommendations show that the Committee defined "non-conforming" as a lawful use or lawfully under construction.

Black's Law Dictionary definition of "non-conforming use" quoted above defines it as including the word "lawful".

The object of a non-conforming use section in a planning statute is to permit an existing lawful use to continue even though the current zoning would prohibit it. The Board cannot interpret section 90(1) to mean that an illegal use becomes a valid use merely because the zoning was changed.

The three properties in this case were all in existence in 1975 when the 1959 Zoning By-law was amended. At that time section 45 of the 1969 Planning Act applied. None of the properties as then and now being used, would have qualified as non-conforming uses since they were not lawfully in existence.

The Board is not prepared to find that these three illegal uses became non-conforming uses when the Planning Act was amended in 1983 and the Town of Truro introduced a L.U.B.

At the time that Dr. Mehta applied for and received the original permits to build these three properties the purpose was stated to be for triplexes. If the buildings had continued to be used as triplexes and providing that the other conditions of the Act were met, then they could now be classified as non-conforming uses.

The use of 118 McLean Street as a 6-unit building by Nyda Enterprises Ltd. is an illegal use. The original permit was for a triplex. The lot size was too small for six units. It is not a non-conforming use. Section 90 of the Planning Act does not apply to it.

The use of 123 McLean Street as a 4-unit building by Dr. Mehta is an illegal use. The original permit was for a triplex. The lot size was too small for 4 units. It is not a non-conforming use. Section 90 of the Planning Act does not apply to it.

The use of 124 McLean Street as a 4-unit building is more difficult. The original 1975 permit states that it is intended to be used for apartments. The permit is related to the application which is stated to be for a triplex. The lot size wass large enough to support 4 units legally. While the building at 124 was lawfully in existence, the Board cannot find that its use as a 4-unit building was lawful. No permit had been obtained to convert it from a triplex to a 4-unit building. The Board finds it was and continues to be an illegal use. It is not a non-conforming use. Section 90 of the Planning Act does not make it a non-conforming use.

During the hearing, Dr. Mehta suggested that there was a personality conflict between he and Peter Nelson, and that this was the reason why the development permits were refused. Dr. Mehta testified that he took steps to avoid this problem by having Mr. Thibeault act for him. Mr. Nelson testified that he understood that Mr. Thibeault owned the property. Given this understanding Dr. Mehta cannot now say that the development permits were refused because of personal animosity.

The Board dismisses the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 9th day of November, A.D., 1990.

LINDA GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

UMMAT v. DARTMOUTH (CITY OF)

PLANNING - REZONING - G.FLUM - NIP - DOWNZONE C-2 TO R-2 - MUNICIPAL DEVELOPMENT PLAN - INTERESTED PERSON - OPINION EVIDENCE - PLANNING ACT, S. 70, PLANNING ACT, 1969.

Property was zoned C-2 but had not been developed to its potential. A Neighbourhood Improvement Plan was implemented and all land in the NIP area was downzoned to R-2 except that already developed as commercial. The appeal was initially filed with the Provincial Planning Appeal Board.

HELD: Appeal allowed in part.

The general intent of the NIP program was supported by the rezoning. The G.FLUM designation for part of the property is Commercial. Council rezoning of this portion of the property ignored or under-emphasized the G.FLUM reservation to Commercial. It is contrary to the intent of the M.P.S. as evidenced in the G.FLUM supported by the development then in existence. With respect to the other areas Council had a discretion to rezone them residential and properly exercised the discretion.

PPAB-7713-341-81-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act R.S.N.S. 1989, c. 346, by DR. S.K. UMMAT from a decision of the Council of the CITY OF DARTMOUTH which rezoned lands of Dr. Ummat at 155 Wyse Road, Lots on Dawson and George Street adjoining 155 Wyse Road, 54 Dawson Street, 46 Dawson Street, 20-22 Dawson Street from Commercial (C-2) High Residential (R-4) to Low Residential (R-2).

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: STEWART McINNES, Q.C., and SHERIFA ELKHADEM, LL.B., on behalf of the Appellant, Dr. S.K. Ummat;

SUZANNE HOOD, LL.B., and PAUL CHARLETON, Articled Clerk, on behalf of the City of Dartmouth,

HEARING DATE: November 1st and 2nd, 1990;

VIEW OF SITE: November 2nd, 1990.

DECISION DATE: November 22, 1990.

DECISION: Appeal Allowed in Part.

DECISION

INTRODUCTION

This appeal is the survivor of a group of appeals by numerous individuals of divers properties in the Northend N.I.P.

Area in or near Wyse Road and Dawson Street in the City of Dartmouth.

The rezoning decision was made by Dartmouth City Council on November 7, 1981, to rezone that large N.I.P. area not already zoned R-1 or R-2 mostly to an R-2 (Two unit) Residential Zone. A Notice of Appeal, dated December 4, 1981, was received by the then Provicial Planning Appeal Board (PPAB) on December 7, 1981.

Without going into details, six or seven of the original Appellants of the November 7th decision as of the opening of this appeal had all effectively abandoned their appeals. We were left now with the single Appellant, Dr. S.K. Ummat. At the start of this appeal hearing the properties of Dr. Ummat subject to the Appeal were:

155 Wyse Road
Lots on Dawson and George Street adjoining 155 Wyse Road
54 Dawson Street
46 Dawson Street
20-22 Dawson Street

PRELIMINARY MATTERS

At the opening of the hearing Suzanne Hood, on behalf of the City of Dartmouth, noted that 20-22 Dawson Street had already been dealt with by the Board on a rezoning appeal. She said 54 and 46 Dawson Street were now owned by somebody other than the Appellant. From that she argued the previous Board decision concerning 20-22 Dawson Street amounted to res judicata and the

Board therefore had no jurisdiction to proceed with the present appeal. She argued the appeal of 54 and 46 Dawson Street was moot because of the change of ownership.

In reply to this Stewart McInnes, on instructions from his client, Dr. Ummat, withdrew his appeal on 20-22 Dawson Street. The appeal in respect to 20-22 Dawson Street was then dismissed. Mr. McInnes maintained his client could continue the appeal of 54 and 46 Dawson Street.

The Board reserved on the mootness of the 54 and 46 Dawson Street issue and continued with the appeal. Opposing counsel agreed there was still a valid appeal outstanding in respect to 155 Wyse Road and adjoining lots behind it on George and Dawson Streets.

This preliminary matter was thus disposed of with the appeal of 20-22 Dawson Street dismissed.

Mr. McInnes had filed a pre-hearing memorandum in which he called the rezoning decision made on November 7, 1981, ultra vires the City of Dartmouth. On this argument he advanced the grounds that the by-law amendment of the major area required a supporting and necessary change to the Municipal Development Plan (M.D.P.). He said such change was necessitated to support a zoning change of that magnitude.

Ms. Hood argued on behalf of the City that the Board had no jurisdiction to declare a zoning by-law ultra vires. She said the Board was not a Section 96 Court. She said declarations concerning the validity of municipal by-laws can only be dealt with by a Section 96 Court of competent jurisdiction.

Mr. McInnes then argued on this preliminary matter that his choice of words "ultra vires" was unfortunate. He meant that the rezoning was not in conformity with the M.D.P. since it was not contemplated by the M.D.P. Consequently the decision of Council could not be reasonably within the non-existent intent of the M.D.P.

Neither party circulated any authorities on this particular point. The Board refused to rule on this matter as a preliminary matter at the time and resolved to decide the matter in this decision.

JURISDICTIONAL FINDINGS

There were no further objections to jurisdiction. Subject to the matter raised in preliminary matters as to the possible Section 96 function of the Board, all other matters necessary to the jurisdiction of the Board have been proven to the satisfaction of the Board. The Board therefore reserves its jurisdictional finding on that one point only and says it has jurisdiction in all other respects.

BOARD PROCESS

Under Section 16(1) of the Municipal Board Act, R.S.N.S. 1989, c. 297, the Chairman assigned Board Member, Richard L. Weldon, to hear the Appeal. The Board heard the appeal agreeably to its Notice of Hearing at its November 2, 1990, sittings. The sittings occurred at the Council Chambers, Alderney Drive, City of Dartmouth.

After the conclusion of the evidence, the Board viewed the sites unaccompanied by counsel and for the sole purpose of visualizing the actual land area concerned. The Board realizes that a view of the site now is of relatively little other use. Since the original rezoning decision in 1981 there has been much development along Wyse Road.

FACTS

The facts in this case are not really in dispute.

At the instance of Dr. Ummat the properties 155 Wyse Road and the lots adjoining 155 Wyse Road on the back had been zoned for some six years as Commercial prior to their 1981 rezoning. While so zoned, Dr. Ummat had not developed them to their C-2 potential.

With appropriate Federal and Provincial funding, the City, previous to this particular (N.I.P.) improvement program, had engaged in six neighbourhood improvement areas in areas of Dartmouth with sub-standard living conditions. After funding these six programs the Provincial and Federal Governments would not fund any more.

City Council felt these N.I.P. programs were beneficial to the City. City Council decided this area (which is shown graphically on Exhibits U-22A, U-22-1A and U-20A and basically comprises an area running almost to Elmwood Avenue on the North, Wyse Road on the East, the sea on the West and the line of the Angus L. MacDonald Bridge on the south) needed a N.I.P.-like program.

On the Generalized Future Land Use Map (G.FLUM) contained in the M.D.P., the lands in question were designated Commercial. They were zoned Residential R-4/Commercial and/or Commercial (C-2).

54-46 Dawson Street had been sold by Dr. Ummat to Lakeview Shopping Centres Limited in 1990.

After public input (including the usual studies for a N.I.P. program), the City rezoned all the land in the N.I.P. area to R-2 except that already developed to commercial use.

No M.D.P. change was made to support this blanket type rezoning.

Dr. Ummat and many other citizens appealed this particular blanket rezoning each in respect to his own properties.

On the rezoning, individuals who were going to be zoned into non-conforming status were told they could legitimize their existing use by development agreement (contract development). Some, so affected, entered development agreements. Some did not bother. At the time of Council's decision, according to the Minutes, Dr. Ummat was not then offered the development agreement (contract development) option.

This appeal languished some time after its initial filing with the PPAB.

The Municipal Board at its own instance set this hearing for November 1, 1990.

ARGUMENTS

Mr. McInnes' arguments on behalf of the Appellant for the properties he still owned was that the rezoning of this magnitude required a supporting change of the M.D.P. No change of the M.D.P. had been made. Initially, Mr. McInnes took the position that this failure made the rezoning change by-law invalid or void. He later altered that argument to say that the zoning by-law was not reasonably within the intent of the M.D.P. on the ground that it required an M.D.P. change to support it. Since there was no M.D.P. intention to support the rezoning, the rezoning decision of Council could not reasonably be within the intent of the M.D.P.

In relation to the properties now owned by Lakeview Shopping Centres Limited, Mr. McInnes argued that there had been an assignment of the right of appeal to Lakeview Shopping Centres Limited which stipulated Dr. Ummat continue the appeal.

To the contrary Ms. Hood argued that the Board had no jurisdiction to declare the by-law ultra vires. Secondly she argued that the rezoning, although of a large area, was clearly a rezoning contemplated within the intent of the M.D.P.

As to the continuation of the appeal in relation to the properties now owned by Lakeview Shopping Centres Limited, Ms. Hood argued there was no appropriate assignment of the chose in action to Lakeview Shopping Centres Limited. Ms. Hood, in all fairness, noted that the 1969 Planning Act's requirement for a qualified Appellant was that of "interested person" and that Dr. Ummat qualified as an interested person. He therefore might have had the right to appeal the rezoning of someone else's land.

Ms. Hood, in the course of her argument, suggested that the test for the Board of the decision of Council (assuming the Board had any jurisdiction at all), was the same whether the 1969 Act or the 1983 Planning Act or indeed the 1989 Revised Statute Planning Act applied. This general test was whether the decision of Council was reasonably within the intent of the M.D.P. She argued Council's decision met that test.

In addition, Mr. McInnes argued that the Board, in comparing the evidence of the two expert planners, (one called by the City and one called by himself from the Department of Municipal Affairs) should favour the opinions of his expert. He said the City planner had her own agenda and her own plan to support. Therefore, as a matter of law, her opinion evidence ought not to be followed when it clashed with that of the expert opinions of Mr. McInnes' expert who was more independent and had no particular position to protect.

This seems to outline the various arguments that were raised during the course of this appeal.

APPLICATION OF LAW TO THE FACTS OF THIS APPEAL

The Board, of course, dismisses, at the request of the Appellant, his appeal in relation to 20-22 Dawson Street.

In relation to the properties 54 and 46 Dawson Street, purchased by Lakeview Properties Limited in 1990, the Board is prepared to accept Ms. Hood's explanation of Dr. Ummat's status as an Appellant. She said that the 1969 Planning Act applies to the qualification of the Appellant in relation to these properties. The test for a qualified Appellant under that Act was that of "interested person". Dr. Ummat, whether or not he now owns the property is, at least, an "interested person". He has evinced a continued interest in that capacity in continuing with this particular appeal.

The Board also accepts Ms. Hood's argument that the Board is unable to make a declaration that the planning by-law passed is ultra vires of City Council since it required a supporting M.D.P. change. If that argument was the sole support of Mr. McInnes' appeal, then of course it would fail in all respects. The Board is not a Section 96 Court of competent jurisdiction and is therefore without jurisdiction to make such a declaration.

The Board, however, must test the decision of Council to see if the rezoning decisions actually passed reasonably fit within the intent of the M.D.P. If an M.D.P. change were a necessary requirement to support the by-law change, such a change had not been made. Then Council's decision to down-zone the subject lands would not have been within the intent of the M.D.P. In such context it is jurisdictionally possible for the Board to proceed to make its determination. It thus has the statutory discretion to scrutinize the decision of Council in that light and will proceed in its duty to do so.

In 1981, Wyse Road was designated commercial for its entire length within the quasi-N.I.P. area. Prior to this rezoning the lands at 155 Wyse Road and the adjoining lots on Dawson and George Street were zoned Commercial C-2.

Since 1981 to the present, much of that side of Wyse Road which was then not commercial in use has pretty well filled in as commercial from Elmwood Avenue south to at least one lot deep along the West side of Wyse Road. The subject property of 155 Wyse Road was, of course, rezoned in 1981 back to R-2.

The properties on 54 and 46 Dawson Street and the lands on Dawson and George Street adjoining 155 Wyse Road are more than one lot depth towards Windmill Road from Wyse Road.

Mr. McInnes' expert, Peter Newboldt, was qualified an expert in planning. He is employed by the Planning and Development of the Department of Municipal Affairs. His evidence is of great interest to the Board.

The nub of his opinion was that an M.D.P. change was necessary to support the rezoning because of the great size of the rezoning here present. He conceded that the rezoning, had it followed his suggested procedure, could easily have been approved. He felt the necessary M.D.P. change could have been made by Council and approved by the Minister.

The Board also concedes Mr. McInnes' evidentiary arguments that one must look at the opinions of the planner from the City, Ms. Richards, very, very carefully.

The Board accepts this as a rule of evidence. The Board uses this Rule as an assistance in attempting to get at the truth of the matter. Which is the better of the two opinions? The two opinions cannot both be accepted. One requires an M.D.P. change to support this rezoning. Ms. Richard's, the City Planner's, does not.

The Board has read the M.D.P. in force as of that time as tendered by the City in its entirety with an attempt to determine its intent.

The Board will then take that intent as it determines it, based on all of the evidence, and weigh the decision of Council against the intent so determined.

The Board notes that the quasi-N.I.P. procedure made here (quasi because there was no Federal or Provincial funding left and the City was funding the whole scheme) was clearly contemplated by many comments and policies in the M.D.P. Starting at [page 2] INTRODUCTION there are these quotations:

> "Introduction
>
> ...
>
> The purpose of the plan is to provide guidance to the decisions of City Council in the regulation of physical, social and economic development and the provision of public services and facilities.
>
> The overall goal of the plan is to provide an orderly system of growth and development within the City, and in doing so, provide for an environment which will make Dartmouth a pleasant and safe place to live and work...."
>
> A series of objectives have been developed from the overall goal stated above.

Title	Objective
Public Participation	To encourage and provide mechanisms for continued public education and involvement and

	participation in the planning process within Dartmouth
Directors for Growth	a) to identify areas for new growth b) to maximize the use of existing infrastructure
Housing	to provide for a high quality of mixed housing stock in sufficient numbers to meet the needs of people of all income groups and in a pleasant and safe environment

....

Commercial - to determine the commercial needs of Dartmouth and regulate the size and location of these facilities.

[Page 3]

Public Participation

...

Public participation in the Neighbourhood Improvement Program has been one of the main factors for the continued success of this program in Dartmouth.

The Public is also invited to participate both formally and informally in zoning matters. This is done mainly through the voluntary hearing process, unique to Dartmouth, and the formal public hearing process required for all zoning amendments.

[Page 4]

...

Policy 1-3 - It shall be the intention of City Council to (a) continue and encourage the going [sic] public participation on decisions which will affect the planning or development of the City and (b) investigate and develop additional methods to foster the ongoing participation of the public.

[Page 22]

...

(1) Existing developed areas within the development

boundary

...Council shall investigate the possibilities and options for redevelopment and infilling of areas throughout the City to make better utilization of existing services.

[Page 23]

...

Rehabilitation of Neighbourhoods and Housing

The proper maintenance of the existing housing stock is a vital element in any housing policy. It is important therefore, for the City to determine where the deterioration of the housing stock is occurring or likely to occur and adopt policies to prevent or reverse this process. (Policy H-5)

...The City should...select as rehabilitation areas, those neighbourhoods within which a significant number of houses and their surroundings are in poor condition.

The City working in conjunction with the residents of each rehabilitation area should undertake a planning program containing some of the following elements: improvements of streets, storm drainage, sanitary sewer, and water supplies if necessary; changes in the street system to improve circulation or to discourage traffic depending on local traffic problems, replotting of vacant lots and their possible purchase servicing and resale by the City, provision of local parks and playgrounds, construction of new schools or community buildings, provision of design and construction advice to homeowners, landscaping of publicly-owned lands, provision of sites for public limited dividend or senior citizens housing, provision of home improvement loans for homeowners,...clearance of sub-standard buildings when rehabilitation is not possible, **amendment to the zoning by-law to protect existing housing or to encourage new development.** [Emphasis of the Board]

Three elements are essential for the success of any rehabilitation program: (1) ... (3) support from the residents of the rehabilitation area.

[Page 24]

...

3. A rehabilitation program will work only if the

residents of the area involved want it to work. They must want to maintain and improve their properties. Without this cooperation, public improvements will be of little consequence. The rehabilitation programs must therefore reflect what the residents consider to be the need for their area rather than what outsiders think would be the best for the area.

At present, the City is actively involved in the Neighbourhood Improvement Program (N.I.P.) in six areas within the City. This program combined with the Federal Residential Rehabilitation Assistance Program (R.R.A.P.) create an almost perfect combination for rehabilitation to take place. (Policy H-6)

...

Policy H-5 It shall be the intention of City Council to encourage and undertake actions to assist in the stabilization of the existing housing stock where rehabilitation is feasible.

Policy H-6 It shall be the intention of City Council to participate in programs such as N.I.P. and R.R.A.P. with the Federal and Provincial governments to rehabilitate the existing neighbourhoods and encourage the establishment of any other such programs.

[Page 28]

...

(b) Local Office - Local offices should be located in close proximity to the people they will be providing the service for. Due to their location, the scale of the local office function should complement the neighbourhood being served. However, they should be located in commercially zoned areas. (Policy C-7)

[Page 29]

...

Policy C-7 It shall be the intention of City Council to allow the local office function to occur within commercially zoned areas and at a scale which is consistent with the neighbourhood being served.

[Page 57]

Implementation

Policy 1P-1

> ...it shall be the intention of City Council to carry on an ongoing planning program...to encourage the general public and organizations to comment on and participate in...neighbourhood planning programs..."

The Board has set out in some detail these policy statements and statements preliminary to the policy to show that the N.I.P. process that was followed here was thoroughly contemplated by the M.D.P.

The resident land owners of the area (plus certain landowners who were non-resident) fully participated in the process coming up with the conclusions of the quasi-N.I.P. program for the subject area. This area included all the lots in question. The Board therefore sees (and both experts agree) that the study and work done on the quasi-N.I.P. plan was useful and appropriate for guidance for Council.

Council's overall duty is to plan for the City so as to meet the general goal stated before.

Given the appropriateness or propriety of the quasi-N.I.P. process here, we are left with Mr. McInnes' suggestion that this matter required an M.D.P. change to shelter the large scale rezoning and Ms. Hood's contrary opinion.

IMPLEMENTATION POLICY "IP-1":

> "Zoning amendments may be considered for any permitted use within each generalized land use category without a plan amendment provided that they do not conflict with the policies of this plan."

And previous to that in the same policy:

> "Table 4 identified, in matrix form, the permitted uses under each category. The uses permitted in the Zoning Bylaw shall be consistent with uses permitted under each category as shown in matrix form on Table 4. The generalized land uses are also shown on Map 9. This map shall be the Generalized Land Use Map for the City of Dartmouth based on the policies contained in this plan."

The Commercial Zone (C-2) in Dartmouth included all residential uses listed in the R-2 Zone (except that of mobile home) together with certain retail trade, service commercial, regional commercial and local office uses. Tourist commercial, warehousing and distribution uses were not included in the residential zoning.

The Board accepts Ms. Hood's interpretation of this Section. Council could make this change without the M.D.P. change despite the size of the area rezoned. R-2 was a permitted use.

Then the Board's test becomes whether or not the decision made was within the intent of the unchanged M.D.P.

The general intent of the N.I.P. program was supported by the rezoning decision of Council.

The G.FLUM designation along Wyse Road was and is commercial, at least one lot deep. The use on Wyse Road to any interested observer then and now assuredly was and is commercial.

Dr. Ummat's property facing on Wyse Road was then zoned commercial.

It is the view of the Board that Council's rezoning of this portion of Dr. Ummat's property ignored, or under-emphasized, the G.FLUM reservation to commercial. The decision was, in part, an unnecessary overreaction by Council to the desire of the N.I.P.

citizens to protect their own residential area.

Council's decision in this case occurred before this Board existed. The Implementation Policies of the M.D.P. were not dealt with in detail by the planners in their report to Council. The Board's rulings on various later appeals insisting these details ought to be laid before Council by planners had not been yet made. The failure, in the view of the Board, of Council to properly take into account the designation and use of Commercial of most of the property facing on Wyse Road was an overreaction to citizen demand. It was contrary to the intent of the M.D.P. as evidenced in the G.FLUM supported by the development then in existence along Wyse Road.

Since the Planners in their report did not sufficiently detail their views on each of the implementation policies, the Board believes Council could have been misinformed concerning the true intent of the M.D.P. That being the situation, the Board finds Council did not, in its decision, give sufficient emphasis on the intent of the M.D.P. which had resulted in the Commercial designation of the lots fronting on Wyse Road. Therefore, the decision of Council in relation to 155 Wyse Road, cannot reasonably be said to be within the intent of the M.D.P.

Different criteria apply to the other properties to the rear of the Wyse Road lots. These lands lie across a back street and adjacent to residential properties. The Council properly had a discretion to rezone them to a residential zone. Factual development and G.FLUM designation altered that discretion in relation to properties fronting on Wyse Road. It properly exercised that discretion in favour of the overall thrust of the quasi-N.I.P. proposals.

By the same reasoning the Board finds that the decision of Council concerning the other two properties, 54 and 46 Dawson Street, still included in this appeal also reasonably fit the intent of the M.D.P.

That being the case, the Board is prepared to say that it will allow the appeal in relation to 155 Wyse Road. It will dismiss the appeals in relation to 54 Dawson Street, 46 Dawson Street and the lots on Dawson and George Streets adjoining 155 Wyse Road. The Appeal in relation to 20-22 Dawson Street has already been withdrawn.

The Board will withhold its final Order until counsel provide the Board with a precise rezoning boundary for 155 Wyse Road. If Counsel cannot agree on such boundary, the Board, on the application of either counsel, will hear evidence on the Zone Boundary location and determine the same for inclusion in the final order herein.

DATED at HALIFAX, Nova Scotia, this 22nd day of November, A.D., 1990.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

STEVENS v. GLACE BAY

PLANNING - L.U.B. AMENDMENT - REFUSAL TO REZONE R-3 TO C-4 - CONVENIENCE STORE - PLANNING ACT, S. 70.

Applicant wished to rezone land to allow for construction of a large convenience store to replace smaller store. Applicant also applied to increase maximum floor area permitted in the C-4 Zone.

HELD: Appeal Dismissed.

It is clearly the intent of the M.P.S. that Neighbourhood Commercial (C-4) development be restricted to a maximum floor area of 600 sq. ft. Development could encroach upon the integrity of the residential neighbourhood because of size. An application to amend L.U.B. to increase maximum floor space from 600 sq. ft. to 3,000 sq. ft. is an increase of such magnitude that it would require an amendment to the M.P.S.

NSMB-27-90-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, R.S.N.S. 1989, c. 346, by **MARY STEVENS** from a decision of the **COUNCIL OF THE TOWN OF GLACE BAY** made June 20, 1990, which refused the Appellant's request to amend the Map and text of the Town's Land Use By-law by rezoning a portion of the property located on the corner of Main Street and Victoria Street from Multiple Residential (R-3) Zone to Neighbourhood Commercial (C-4) Zone to permit the construction of a 3,000 sq. foot convenience store and amending the text of the Land Use By-law to permit 3,000 sq. foot convenience stores in a Neighbourhood Commercial (C-4) Zone.

BEFORE: MICHAEL G. JOHNSON, Chairman.

COUNSEL: MARY STEVENS on behalf of herself;

J. REEVES MATHESON, LL.B., on behalf of the Town of Glace Bay.

HEARING DATE: November 6, 1990.

DECISION DATE: December 3, 1990.

DECISION: **Appeal Dismissed.**

DECISION

Mary Stevens and her husband are the owners of property located at the corner of Main Street and Victoria Street in the Town of Glace Bay.

This particular piece of property has contained a convenience store since the late 1920's. For a number of years the property has been leased to and operated by people other than Mrs. Stevens and her husband. Until the late spring of 1989 the property contained a small convenience store with video games which was operated by the lessee until late in the night. When the lease expired Mrs. Stevens demolished the building housing the store. That portion of the site still remains vacant. Also located on the property is a residential house.

Mrs. Stevens wishes to have a 3,000 sq. foot building constructed on the site which would then be leased to others to operate with stricter lease provisions. The major portion of the property owned by Mr. and Mrs. Stevens is already zoned Neighbourhood Commercial (C-4). This portion also contains the house. The remaining vacant area, approximately 3,300 square feet, is zoned Multiple Residential (R-3). In order to facilitate parking for the proposed development, this remaining piece of land needs to be zoned C-4. In order to construct the new facility it would be necessary to demolish the existing residential building.

The current Land Use By-law (L.U.B.) for the Town permits only the construction of a 600 sq. foot building in a C-4 Zone. Mrs. Stevens has also applied to have this maximum restriction increased to 3,000 sq. feet in order to facilitate the construction of the proposed new facility.

The Planning and Development Committee (P.D.C.) reviewed the application at its meeting held June 14, 1990. The Cape Breton Metro Planning Commission (Commission) in a report dated

June 4, 1990, recommended rejection of the application. The P.D.C. accepted this recommendation of the Commission.

The Council for the Town of Glace Bay at its June 20, 1990, meeting adopted this recommendation of the P.D.C. Council thereby refused Mrs. Stevens' application to rezone the property and to amend the wording of the L.U.B.

Mary Stevens testified on her own behalf. She reviewed the history of the property and her involvement therein. She also explained to the Board some of the details of the proposed new development for the property.

Kenneth L. Smith, testified on behalf of the Town. Mr. Smith is a Senior Planner for the Commission and was the author of the Report dated June 4, 1990. Mr. Smith reviewed the specifics of the report and his reasons for recommending rejection of the application.

Audrey Terrier testified in favour of the development explaining her understanding of how her parents, Mr. and Mrs. Stevens, were proposing to develop the property.

In addition to these three witnesses, thirteen other people testified before the Board in opposition to both the proposed rezoning and the L.U.B. amendment. Most were residents of the neighbourhood. Some others were operators of convenience stores near the subject property. Not only were these witnesses in opposition to the size of the new proposal, most were in direct opposition to any development of a convenience store on that particular corner of Glace Bay mainly because of the recent history associated with the previous lessee.

The Board has reviewed the Municipal Planning Strategy (M.P.S.) for the Town of Glace Bay and in particular the preamble to the Neighbourhood Commercial Section and Policies 17, 18 and 19, contained therein. Policy 19 contains the criteria to be followed for a zoning amendment of the L.U.B.

The Board has also reviewed the L.U.B. for the Town and in particular Part 14 dealing with the Neighbourhood Commercial (C-4) Zone which contains the uses permitted, zone requirements and special requirements for development in such a zone. One of these special requirements restricts the size of a development to a maximum floor area of 600 sq. ft.

It is clearly the intent of the M.P.S. and supported by the provisions of the L.U.B. that Neighbourhood Commercial (C-4) development be restricted to a maximum floor area. One of the criteria of Policy 19 of the M.P.S. is that the proposed development meet the maximum floor area requirements of the L.U.B. The proposed new building will exceed the 600 sq. ft. maximum floor area requirement.

It appears to the Board that the proposal meets the other criteria listed in Policy 19 and the special requirements of Part 14 with the possible exception that it could encroach upon the integrity of the residential neighbourhood because of size.

Because Mrs. Stevens wishes to exceed the 600 sq. ft. maximum, she applied to amend the L.U.B. to increase the floor area restriction to a maximum of 3,000 sq. feet. It is the Board's opinion that an increase of this magnitude is outside the intent of the M.P.S. Consequently it would require a change to the M.P.S. before Council could make such a change of this size. Therefore Council's decision refusing the application was reasonably within the intent of the M.P.S.

The request for the rezoning of the (R-3) land to (C-4) became useless to Mrs. Stevens with Council's refusal to increase the restriction of maximum floor area. Also, without this change, Mrs. Stevens proposal did not meet the requirements of the L.U.B. Therefore Council's refusal to rezone the property from R-3 to C-4 was also reasonably within the intent of the M.P.S.

The Board is somewhat concerned that many of the residents who testified before it believed that the Board could prevent the construction of any convenience store on the subject property. What was before the Board was a rezoning for a small portion of the subject land and a general amendment to the L.U.B. to permit a 3,000 sq. ft. convenience store. The Board's decision does not change the existing C-4 Zone.

Section 70(6) of the Planning Act requires that "the Board shall not interfere with the decision of Council unless the decision cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy."

The Board has determined that the decision of Council was consistent with the intent of the M.P.S. Consequently, as provided by Section 70(5)(a), the Board confirms the Decision of Council and dismisses the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 3rd day of December, A.D., 1990.

MICHAEL G. JOHNSON
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

MacKAY ST. RES. & MUISE v.STELLARTON & ROBSON

PLANNING - L.U.B. AMENDMENT - REZONING FROM R-2 TO C-2 - RESIDENTS ASSOCIATION AS AGGRIEVED PERSON - LOUNGE - WHETHER DECISION OF COUNCIL REASONABLY CARRIES OUT INTENT OF M.P.S. - PLANNING ACT, S. 61(2); 70; 70(2), - STELLARTON M.P.S., POLICY 21, 22, 70.

This is a consolidated appeal of appeals by MacKay Street Residents and J. Richard Muise as aggrieved persons made from a decision of the Council of the Town of Stellarton rezoning lands off MacKay Street from R-2 to Downtown Business (C-2) Zone to permit the construction of a restaurant and lounge. Town's planning service recommended approval. P.A.C. concurred. No one objected at the Council's public meeting. No notice was given other than by newspaper to the general public or the inhabitants nearby.

HELD: Appeal allowed.

The Board did not formally rule on whether or not the MacKay Street Residents met the requirements of Section 70(2) of the Planning Act respecting an aggrieved person. Mr. Muise's Appeal and his status as an aggrieved person was sufficient to maintain the action. The only question on status is whether the MacKay Street Residents is an organization. The Planning Act does not define "organization". Attendance at the Board hearing and concern expressed is in sharp contrast to lack of protest at public hearing held by Council. Both Council and the Board advertised their hearing in the local paper. The Board also requires the Appellants to serve all assessed owners within 500 feet of the subject property with a copy of its Notice of Hearing. An L.U.B. can require that affected property owners be notified of proposed amendments. Stellarton has not adopted this provision in its L.U.B. The Board suspects that Council made its decision on the basis that no one was opposed. Despite specific wording the Board believes Policy 22 permits Council to consider rezoning R-2 uses to C-2 uses. Council retains a discretion whether or not to permit a specific request. In exercising its discretion Council must consider the criteria set out in Policy 70. Council should have and did not consider extra policing costs made necessary by lounge. Council should have all relevant facts before it to make its decision. Board limited in power. It cannot refer the matter back to Council. The Board is not prepared to second guess Council and say that it would have made the same decision if it had heard all the evidence that the Board heard. The Board determines that Council's decision cannot reasonably be said to carry out the intent of the M.P.S.

NSMB-18-90-P
NSMB-19-90-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act by **MacKAY STREET RESIDENTS** and an appeal by **J. RICHARD MUISE** from a decision of **STELLARTON TOWN COUNCIL** made June 25, 1990, which rezoned lands located off MacKay Street from Residential Single Dwelling (R-2) Zone to Downtown Business (C-2) Zone to permit a restaurant and lounge on the application of **ROBERT ROBSON**.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: DONNA STEWART, on behalf of the MacKay Street Residents,

RICHARD MUISE, on his own behalf,

JOHN BAKER, Q.C., on behalf of the Town,

PETER ROGERS, LL.B., on behalf of the Applicant.

HEARING DATE: November 8, 1990.

BRIEFS SUBMITTED: November 20, 1990 by Donna Stewart
November 21, 1990 by Richard Muise

DECISION DATE: December 3, 1990.

DECISION: Appeal Allowed.

DECISION

In the fall of 1989, Rob Robson, the Applicant, entered into an Agreement of Purchase and Sale with John Keay respecting 6 lots on MacKay Street in the Town of Stellarton. The Agreement is conditional on Mr. Robson obtaining appropriate zoning and a liquor licence for a "lounge/tavern" on the property.

On April 27, 1990, Mr. Robson applied for an amendment to the Land-use By-law (L.U.B.) to rezone four of the six lots from Residential Single Family (R-2) Zone to Downtown Business (C-2) Zone. The application stated that the proposal included "the construction of a new building in the Town of Stellarton for the purpose of operating a restaurant and lounge". The application was referred to the Planning Advisory Committee (P.A.C.)

P.A.C. first discussed the application at its meeting on May 1, 1990. The minutes note that the proposal is "to build a Residential/Lounge to face on MacKay Street with parking further along MacKay Street".

P.A.C. requested the Pictou County District Planning Commission, the Town's Planning service, to prepare a Technical Report on the proposed amendment. Hugh Gillis prepared the Technical Report. He recommended approval subject to a favourable review by the Town Engineer regarding sewage and water capabilities.

On May 29, 1990, P.A.C. discussed the Technical Report and unanimously agreed to recommend that Council rezone the land. The following day Council held a special meeting and set June 25, 1990 for the required public hearing. The Minutes of the regular Council meeting on June 11, 1990, note that the public hearing was set for 6:00 p.m. on June 25, 1990. The Minutes of these three meetings made no reference to the intended use of the property.

The Notice of the Public Hearing was advertised in The

Evening News on June 7th and 14th, 1990. The advertisement included a site map and stated the reason for the amendment as follows: "to permit these lands to be used for commercial purposes; i.e. restaurant and lounge."

No member of the public attended the Public Hearing. Mr. Robson did not arrive until after the matter was dealt with. Apparently, Council held the Public Hearing and its own meeting simultaneously. The Minutes indicate that Council dealt with the application in conjunction with an application to rezone property at the Heather Motor Hotel. The Minutes are brief and are as follows:

> "RE-ZONING HEATHER MOTOR HOTEL
>
> The Clerk reported that no written objections had been received to the rezoning for the Heather Motor Hotel or the Robson property on MacKay Street. Consequently on motion Couns. S. Kirincich and J. Hood it was agreed to continue the rezoning process on these two properties."

The residents of MacKay Street and Acadia Street did not become aware of the rezoning and the proposed restaurant and lounge until after Council made its decision.

On July 2, 1990 a letter of protest was sent to the Pictou County Planning Commission. It was signed by five residents and was accompanied by a petition of 17 names. [The letter is actually dated June 2nd, but the evidence established it was not written until July.]

A Notice that Council had approved the rezoning was advertised on July 12, 1990. Following that, J. Richard Muise, one of the Appellants, wrote to the Town's Development Officer outlining his concerns about the proposed restaurant and lounge. Mr. Muise owns two apartment houses on Acadia Street. They abut the subject properties.

On July 25, 1990, the Board received a letter signed "MacKay Street Residents". The Board treated this letter as a Notice of Appeal of Council's decision. The Board requested that an Amended Notice of Appeal be filed. The Amended Notice of Appeal was signed by Betty G. MacKenzie on behalf of the MacKay Street Stellarton Residents.

On July 31, 1990, Mr. Muise filed a separate appeal with the Board. The Board decided to hear the two appeals together.

At the beginning of the Board hearing, Mr. Robson's lawyer raised a question of whether the MacKay Street Residents was a proper party under the Planning Act, R.S.N.S. 1989, c. 346. The Board determined that although a number of persons had signed the petition, there were only four people resident on MacKay Street who were actively involved in the appeal - Donald Dunlop, Donna and Peter Stewart and Betty MacKenzie.

The Board did not formally rule on whether or not the MacKay Street Residents met the requirements of Section 70(2) of the Planning Act respecting an aggrieved person. Mr. Muise's appeal and his status as an aggrieved person was sufficient to maintain the action. He is clearly an aggrieved person. Individually, the four named persons of the MacKay Street Residents would also meet the definition of aggrieved person. The only question that remains is whether the MacKay Street Residents is an organization. The Planning Act permits unincorporated organizations to appeal. It does not define organization. In this case, there were some meetings of concerned residents and at some point a name was adopted. In reviewing this matter the Board now feels that the issue could have been explored more fully at the hearing. Since there is a valid appeal filed by Mr. Muise, the Board declines to rule on whether or not the "MacKay Street Residents" is an organization.

The Board began its hearing at 10:00 a.m. on November 8, 1990. At that time there were about 16 to 18 persons in attendance in addition to the parties and witnesses. Many of these people were elderly. They were obviously interested in the appeal and some did attempt to make comments. Most of these people did not return after the lunch break.

The Board held an evening session starting at 7:00 p.m. for members of the public to make their views known. Approximately 23 persons in addition to the parties attended. Three of these persons made presentations to the Board, all opposed to the proposed restaurant and lounge.

The attendance at the Board hearing and the concern expressed is in sharp contrast to the public hearing held by Council. It appears to the Board that no one other than the Applicant and members of P.A.C. and Council were aware of the proposal before Council made its decision on June 25th.

While both Council and the Board advertised their hearing in the local paper, the Board also required the Appellants to serve all assessed owners within 500 feet of the subject property with a copy of the Notice of Hearing.

The Planning Act encourages public participation in planning matters before Council. Council must hold a public hearing and advertise it for at least two weeks. Section 61(2) states that a L.U.B. can require that affected property owners be notified of proposed amendments. This is an optional provision. It should be mandatory. The Town of Stellarton has not adopted this provision in its L.U.B.

The Board feels there has been a failure in the system in this case. The Applicant was not required to (and chose not to) inform the residents of his intentions. The local newspapers apparently did not run a story on the proposed development before the public hearing.

The Minutes of Council quoted above imply Council made its decision because no written opposition was received. A similar comment was made in the Minutes of the May 30th meeting: "It was noted that no objections had been received pertaining to either request". This leads the Board to suspect Council did make its decision on the basis that no one was opposed.

No member of Council testified before the Board. Hugh Gillis testified that he recalled some discussion but did not know if Council members had received a copy of his Report. The Report was prepared for P.A.C. Only 3 members of Council are members of and were in attendance at the P.A.C. meeting during which the proposal was discussed. At that meeting, Mr. Robson made a presentation and Mr. Gillis' Report was discussed.

The Town did not take an active role in the Board hearing. Mr. Baker represented the Town and cross-examined some of the witnesses. He did not make any argument in favour or against Council's decision.

Foord Street is the main street of Stellarton. It runs north and south. Immediately to the east of Foord Street is MacKay Street which runs between Bridge Avenue and the north side of Acadia Street and is parallel to Foord Street. At Acadia Street there is a slight jog to the west where an extension of MacKay Street runs from the south side of Acadia Street and curves up to join Foord Street. The street sign is marked South MacKay Street. All the witnesses and Council documents referred to it as MacKay Street. In order to distinguish the two sections of MacKay Street, the Board will use the term South MacKay Street.

There is a large red building on the south east corner of Acadia and South MacKay Street. The building is empty but formerly housed a business. There is some vacant land next to it on Acadia Street. Next to that are the two apartment houses owned by Mr. Muise.

This large red building and the vacant land occupy 2 of the 6 lots which Mr. Robson agreed to purchase. These two lots are zoned Downtown Business (C-2) Zone. The remaining 4 lots run along the east side of South MacKay Street. They are zoned Residential Single Family (R-2) Zone. The proposal is to tear down the red building and an attached shed. The new building will be 20 feet in from Acadia Street and will front on South MacKay Street with parking further along South MacKay Street. The rear of the subject property abuts a railway yard owned by Canadian National Railway. The only other abutting landowner is Mr. Muise.

Across from the lots on South MacKay Street is the rear of a shopping plaza containing a Sobey's store, a bank and a dry cleaners. There is also one single family home adjacent to the Plaza.

Immediately to the east of MacKay Street is King Street which runs from Acadia Street north to Bridge Avenue.

Policy 21 of the Town's Municipal Planning Strategy (M.P.S.) provides for a Downtown Business Area on the Generalized Future Land Use Map. The area so designated is shaped like tongs or tweezers. The arms of the tongs are Foord Street and King Street with the hinge coming at the intersection of South MacKay Street and Acadia Street. The six lots are within the Downtown Business Area.

The part of MacKay Street running north from Acadia Street is designated Primary Residential. This designation runs along the rear lot lines of the properties fronting on MacKay Street.

Policy 22 provides for the zoning in the Downtown Business Area and reads as follows:

> "Policy 22
>
> Council shall also establish the DOWNTOWN BUSINESS (C-2) Zone in the Land-Use By-law which shall apply to all land in the DOWNTOWN BUSINESS AREA excluding vacant lots and existing single family homes which shall be zoned R-2.

> Permitted uses in the C-2 Zone shall include commercial businesses, multi-family residential dwellings, clubs, fraternal organizations, offices, parks, indoor recreational uses, and other similar uses. The Sobey Head Office complex shall be a permitted use in the C-2 Zone. The Scotsburn Dairies distribution plant and existing automobile sales establishments shall also be permitted, however, new automobile sales establishments, and other uses which require large outdoor storage areas or which are not conducive to pedestrian shopping, shall not be permitted in the C-2 Zone. Provisions of the c-2 Zone regarding maximum building size, setbacks, parking, limits on outdoor storage, and other matters are intended to encourage the development of the downtown as a pedestrian oriented business area and to permit a high density development."

In accordance with this Policy, the four vacant lots that are the subject of this appeal were zoned R-2. There is nothing in Policy 22 which deals with rezoning R-2 uses to C-2. In other sections of the M.P.S. there are specific policies which govern rezonings.

The Applicant argues that the intent of Policy 22 is that the R-2 uses in the Downtown Business Area may be rezoned C-2. Mr. Gillis agreed with the Board that it was unusual not to have a statement dealing with such rezonings. He felt, however, that the intent was to permit such rezonings. He referred to Implementation Policy 70 which provides as follows:

> "Policy 70
>
> In considering an amendment to the Land Use By-law, in addition to all other criteria set out in various policies of this Strategy, Council shall have regard to the following matters:
>
> a) the proposed amendment is in conformance with the intent of the MUNICIPAL PLANNING STRATEGY and the requirements of the Land Use By-law and all other Town By-laws and regulations;

b) proposal is not premature or inappropriate by reason of:

> i) the financial capability of the Town to absorb any costs related to the development, or
>
> ii) creating a ribbon or scattered development pattern as opposed to compact development."

The introductory words of Policy 70 suggest to the Board it was intended that this policy would be in addition to a specific policy permitting a rezoning or amendment to the L.U.B. Policy 20, for example, permits a rezoning of land in the Primary Residential area to Neighbourhood Commercial (C-1) subject to certain criteria including:

> "(d) the lot can be used for commercial purposes without detrimentally affecting land uses by virtue of its size, increased traffic or on-street parking, noise, odour, lighting or signage".

Since any existing single residential family homes in the Downtown Business Area are zoned R-2, it is surprising that some criteria dealing with adverse effects of a proposed rezoning to C-2 was not included in Policy 22.

The overall intent of Policy 22 is to create the Downtown Business Area. Despite the lack of specific wording to permit the rezoning of R-2 uses to C-2, the Board believes that the intent of Policy 22 is to permit Council to consider rezoning requests. Council retains a discretion whether or not to permit a specific request. In exercising its discretion Council must consider the criteria set out in Policy 70.

The Board is satisfied that the proposed rezoning will not create a ribbon or scattered development pattern.

A second criteria in Policy 70 is that the proposal is not premature or inappropriate due to the financial capability of the Town to absorb any costs related to the development. In the Technical Report, Mr. Gillis noted that the proposal would increase the demand on sewage and water capabilities. He also noted concerns expressed by the Traffic Authority about increased pressure on parking. No other possible costs were discussed in the Report. The Town Engineer has now indicated that there is adequate water and sewage capacity.

The Town's Traffic Authority is also the Chief of Police. Chief Whitewood was called by the Appellants. He testified that he had not been asked by Council if he had any concerns from a policing point of view about the proposed development. He told the Board that he believed that if the proposal proceeds it might result in the Town having to hire an additional police officer. There are, at present, six drinking establishments in the Town and three of these have created problems for the police. The suggestion was that it was "outsiders" who caused the problems. Chief Whitewood felt there could be similar problems with a lounge.

In the Board's opinion, policing costs are a proper cost to consider in assessing a proposed development which is to include a lounge. Council does not appear to have considered this potential cost.

The third criteria in Policy 70 is whether the proposal is in conformance with the intent of the M.P.S. and the requirement of the L.U.B.

The M.P.S. devotes a number of pages to the Downtown. The overall emphasis is that it should be the main shopping area but with a pedestrian character. Restaurant and lounges are not specifically mentioned in the list of uses in Policy 22, however, restaurants are a use associated with a shopping area. Lounges which are used largely during hours when the stores are closed are not as easily associated with a shopping area.

Part 10 of the L.U.B. deals with the Downtown Business (C-2) Zone. Restaurants are a permitted use. Lounges and taverns are not listed. The word restaurant is not defined in the L.U.B. The Board is prepared to accept that the intention is that the word restaurant, as used in the L.U.B., includes lounges and taverns. The Board distinguishes its decision in Elmers and Casablanca v. Wolfville (1988), 7-B M.B.D. 605, in which it held that the word "restaurant" did not include beverage rooms and lounges. In that case there was evidence showing the Town's intent that the word restaurant did not include these additional uses.

The proposal appears to meet the other requirements of the L.U.B. including parking.

In assessing this proposed rezoning, it is necessary to keep in mind that the 2 lots on Acadia Street are already zoned C-2. This was done when the M.P.S. and L.U.B. were first adopted. These two lots are directly across from the entrance to MacKay Street and the single family homes. One of Mr. Muise's buildings is adjacent to these lots.

The lots which are the subject of the rezoning face on South MacKay Street opposite the back end of the plaza and one single family home. In the rear is a railway yard which in the past was used for shunting trains. The lots also abut the rear of Mr. Muise's properties.

The Appellants' opposition to the rezoning is based on the following concerns:

1) Senior Citizens - there are many senior citizens living in the area who have already experienced difficulties in crossing Acadia Street and this problem will be worse if the development proceeds.

2) Increased Traffic - there are traffic lights on Foord Street and only stop signs on MacKay. The residents feel that patrons of the restaurant and lounge will use MacKay Street increasing an already crowded street. They note that the Legion is located on MacKay Street.

3) Parking - the proposed parking lot will hold 44-48 cars while the restaurant and lounge will seat 140 persons. The residents are concerned that patrons will park on Acadia and MacKay Streets.

4) Noise - there is concern about the noise from within the lounge when there is entertainment. There is also concern about the noise when patrons leave the lounge in the early morning hours. Some of the residents already

have experienced noise problems with Sam's Restaurant and Lounge, located on Foord Street.

5) Glare from lighting and signs - Mr. Muise is concerned that lighting for the parking lot will bother his tenants.

6) Property Devaluation - the residents are concerned that their property will be devalued as a result of the development. Those who are landlords fear their tenants will leave and that it will be difficult to replace them.

7) Children's Safety - the residents are concerned that the increased traffic and the risk posed by impaired drivers will have an adverse effect on the safety of children living and playing in the area.

Of these seven concerns, only one, parking, was noted in the Technical Report. There is no evidence that Council considered any of these other concerns.

Mr. Robson stated that he intends to install insulation that will reduce noise levels. He wants to run a family-oriented restaurant and does not want to be in the tavern business. [There was no explanation given about the reference to a tavern in the Agreement of Purchase and Sale.] Mr. Robson feels the traffic will use Foord Street or King Street. He said he plans to install lighting on the building which does not cause a glare but does admit there will be lighting in the parking area.

The Board is concerned that Council was not aware of the concerns of the residents. A decision to amend the L.U.B. is discretionary. Council should have all relevant facts before it makes its decision.

Section 70 of the Planning Act only permits the Board to confirm Council's decision or allow the appeal by reversing the decision. There is no power to refer the matter back to Council to further consider the matter.

In the Board's opinion Council did not have adequate information before it made its decision. While the decision might have been the same, Council cannot be said to have made a fully informed decision. The Board is not prepared to second guess Council and say that it would have made the same decision if it had heard all the evidence which the Board heard.

The Board determines that Council's decision cannot reasonably be said to carry out the intent of the Municipal Planning Strategy.

The Board, therefore allows the appeal and reverses Council's decision amending the L.U.B.

DATED at HALIFAX, Nova Scotia this 3rd day of December, A.D., 1990.

LINDA D. GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

ELWORTHY ET AL v. CO. OF CAPE BRETON AND HATFIELD

PLANNING - REZONING FROM WS TO C-2 - BEST INTERESTS - NO M.P.S. - PLANNING ACT, S. 70(7).

Council in 1986 rezoned land to Water Supply Zone based on wrong watershed map. Land had earlier been rezoned to C-2. Owner now wished to develop a restaurant, gift shop and bakery. Council made application to correct error and rezone property to C-2. Residents appealed based on objections to proposed development.

HELD: Appeal Dismissed.

The Municipality made the application for rezoning in order to correct an error. Such corrective action would appear to be in the best interests of the Municipality. There is insufficient evidence to justify interfering with Council's decision.

There were many unsubstantiated comments concerning the validity of many of the names included on petition. No direct evidence was presented so Board can place little weight on these.

NSMB-16-90-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, R.S.N.S. 1989, c. 346 by **KEVIN ELWORTHY, CATHY ELWORTHY, ROBERT MADER, JUDY MADER, EDWARD MADER and ELEANOR MADER** from a decision of the Council of the Municipality of the County of Cape Breton made July 13, 1990, which approved an application of the **MUNICIPALITY** to rezone property owned by **LINDA HATFIELD** located on Mira Road, Cape Breton, from Water Supply (WS) Zone to Commercial (C-2) Zone to permit the operation of a craft shop and restaurant.

BEFORE:	MICHAEL G. JOHNSON, Chairman.
COUNSEL:	KEVIN ELWORTHY on behalf of himself and the other Appellants;
	DAVID L. DELANEY, LL.B., on behalf of Linda Hatfield;
	DAVID N. MUISE, LL.B., on behalf of the Municipality of the County of Cape Breton.
BRIEFS SUBMITTED:	November 2, 1990 for Kevin Elworthy, November 8, 1990, for Linda Hatfield, November 7, 1990, for the Municipality.
HEARING DATE:	October 25, 1990.
DECISION DATE:	December 3, 1990.
DECISION:	Appeal Dismissed.

DECISION

In 1985, Council approved the rezoning of the subject lands owned by Linda Hatfield (formerly Mader) from Residential (R-

1) to Commercial (C-2) Zone to permit the construction and operation of a fast food outlet.

In the Fall of 1986, Council initiated a rezoning to align the existing County water supply area with the City of Sydney public water supply boundary. This rezoning was based on a map dated September 18, 1956. Included in the boundaries of this rezoning was Mrs. Hatfield's property which had previously been rezoned (C-2). Also included were certain surrounding residential properties zoned (R-1) and an additional area which was zoned (R-5). In addition to these three sites, eight other sites were affected by the amendment. There are not of concern to Council's current decision. All eleven sites were rezoned to Water Supply (WS) Zone. Neither the 1985 rezoning to (C-2) nor the 1986 rezoning to WS were appealed.

Recently a new map for the Sydney Public Water Supply Watershed was discovered dated June 27, 1958, which replaced the 1956 Sydney Public Water Supply Watershed Map. This map excluded Mrs. Hatfield's property and much of the neighbouring properties which had previously been rezoned to (WS). The 1986 rezoning now appears to have been done in error as it was based on the wrong watershed map.

For a variety of reasons Mrs. Hatfield did not proceed with the establishment of her fast food outlet in 1985. She now wishes to proceed with the development of a restaurant, gift shop and small bakery on her piece of property. She is unable to do so because her property is no longer appropriately zoned.

As a result of the situation caused by the confusion of the two maps, Cape Breton Metro Planning Commission (Commission) recommended that Council initiate a municipal zoning amendment process. The purpose would be to rezone these three immediately affected areas from water supply area (WS) to Residential (R-1) (Site 3), to Residential (R-5) (Site 1) and Mrs. Hatfield's property to Commercial (C-2) (Site 2), thus rectifying the error and restoring the previous zoning thus properly defining the Sydney watershed boundary. This recommendation was included in the report dated April 26, 1990 of the Commission. This report outlined the history concerning the previous rezonings and refers to the fact that Mrs. Hatfield "intends to initiate the commercial venture".

On May 1, 1990, the Municipality of the County of Cape Breton, itself, made the application to accomplish the rezoning. The Planning Advisory Committee (P.A.C.) reviewed the application and the recommendation of the Commission. P.A.C. recommended the amendment to Council for final approval.

On June 19, 1990, Council gave approval to the amendment of all three sites following a public hearing. The only comments concerning the public hearing noted in the Minutes relate to the location of the City's watershed boundary and its affect on negotiations of various residents of the area with the City of Sydney. There was no mention of Mrs. Hatfield's property or the proposed development.

The Appellants' Notice of Appeal from this decision was received by the Board on July 13, 1990. The Appeal was concerned with only the portion of the decision of Council which related to Ms. Hatfield's land which was known as Site 2. There was no appeal respecting Sites 1 and 3.

The land subject to this rezoning measures approximately 40 metres along the highway to a depth of slightly over 48 metres and is located on route 22 known as the Mira Road, approximately a kilometre and a half from the intersection with Highway 125.

The Board ruled that the Appellants were aggrieved persons per Section 70(1) and (2) of the Planning Act. There was no objection to this.

Although the Municipality made the application to rezone much of the evidence in opposition to the rezoning centered around the proposed use of the property by Mrs. Hatfield.

Mr. Elworthy testified on his own behalf stating his reasons for objecting to the rezoning. His objections included:

1) the variety of uses permitted within a (C-2) Zone and that the scale of the development would not be restricted.

2) The increase in traffic and related noises.

3) The proposed hours of operation from 10:00 a.m. to 11:00 p.m. would adversely affect the area.

4) Unhealthy environment for small children in the immediate area.

5) Value of the homes in the abutting areas would be diminished.

6) Problem related to garbage on the site.

Mr. Elworthy stated that he did not object to the original application of Mrs. Hatfield in 1985 but felt compelled to do so now.

Linda Hatfield testified on her own behalf. She reviewed her work experience, qualifications and plans for the development of the property. She said that instead of a fast food operation she now wished to develop a restaurant with a small gift shop. She currently operates a small bakery out of her mother's house located on adjoining property. She intends to operate the bakery from the new facility. The majority of the sales of the bakery are to shops in the City of Sydney with the remainder local retail.

She stated that the design of the new building would be in keeping with the residential nature of the area, and that it was intended to be landscaped and fenced in. The garbage will be stored in enclosed containers. Food will be served within the building to approximately 35 to 60 customers. There will be no takeout other than for baked goods. The development, including the bakery, will provide employment for up to eight people in the peak summertime period.

At the general public session of the hearing, four people (including two of the Appellants) testified in opposition to the proposed development. One other person, who was a member of the committee currently preparing a Municipal Planning Strategy (M.P.S.), informed the Board of the current progress of the development of that Strategy. The process was incomplete and therefore could not be of use to the Board at this time.

The witnesses opposing the development expressed similar concerns to those stated by Mr. Elworthy earlier in the hearing.

At the conclusion of the hearing, Mr. Elworthy and counsel for the other two parties presented verbal arguments. In addition the Board permitted Mr. Elworthy to present a written submission subject to written rebuttal from counsel for the other two parties.

After the hearing adjourned, the Board was informed that the last name shown for two of the Appellants, Edward and Eleanor Mader, should have been Burton. The name Mader was the maiden name of Eleanor Burton. As this information was not presented to the Board during the hearing no change in the Notice of Appeal has been made.

When Mr. Elworthy submitted his brief to the Board he included some new evidence which was not brought up at the appeal hearing. This new evidence related in part to names on a Petition submitted on behalf of Mrs. Hatfield and the inclusion of a new Petition. The Board cannot consider this new evidence when rendering its decision.

In this particular appeal there were a number of Petitions and letters entered in evidence by the parties in support of their various positions. A Petition was entered by the Appellants listing a number of people opposed. A Petition was entered on behalf of Linda Hatfield with a number of names indicating support for the proposed rezoning. During his verbal argument, Mr. Delaney further introduced a number of letters purporting to be in favour of Ms. Hatfield's proposal. Included in Mr. Elworthy's written brief was another Petition from residents of the area basically stating that they did not understand the Petition they originally signed on behalf of Mrs. Hatfield. As already discussed, the Board cannot consider this Petition.

There were many unsubstantiated comments between the parties concerning the validity of many of the names included on these petitions presented to the Board. However, there was no direct evidence presented. Consequently, the Board can place little weight on any of these pieces of evidence before it.

This area of the Municipality of the County of Cape Breton does not have a M.P.S. in place. In such situations, Section 70(7) of the Planning Act requires that:

> "The Board shall not interfere with the decision unless the decision of the Council is inconsistent with or unnecessary for the protection of the best interests of the Municipality".

The Board has reviewed the evidence of Mr. Elworthy and the other residents of the neighbourhood. The concerns about traffic and property values were unsubstantiated by any specific details. There were no traffic surveys carried out, nor was any evidence submitted to substantiate the claim of a drop in property values. While valuing the opinion of Mr. Elworthy and other witnesses the Board must carefully weigh such unsupported statements of opinion when determining whether or not to overturn a Council's decision.

Mr. Elworthy listed off a large number of possible uses that the property could be put to once it has been rezoned should it not be used for the intent expressed. Counsel for the Municipality pointed out that many of the suggested uses would not be permitted on the lot because of the small size of the land being rezoned. Therefore such "worst case scenario" activities would not be permitted by other restrictions of the Land Use By-law (L.U.B.). The Board agrees with this argument of Mr. Muise.

In a number of previous decisions the Board has referred to the fact that a certain amount of trust may be placed in the developer when zoning by-law changes are being considered (Mader v. Municipality of the County of Halifax MBD 1988, 7-B 301, and Vaughne Realty v. Town of Yarmouth MBD 1989, 8-B 471). Based on this element of trust it is not necessary or even always appropriate for a Council to consider the worst case scenario in making a decision. Despite some inuendoes to the contrary, the Board sees nothing to indicate that Mrs. Hatfield has any other intent but to do as she has stated.

Mrs. Hatfield did not make this application for rezoning. She already did so and received approval in 1985.

In fact, the Municipality made this application for the rezoning in order to correct an error which had previously occurred. Such a corrective action would appear to the Board to be in the best interests of the Municipality.

As previously mentioned, the Board cannot reverse the decision of Council unless it determines that this decision was inconsistent with or unnecessary for the protection of the best interests of the Municipality.

In the Board's opinion there is insufficient evidence to justify interferring with Council's decision.

Therefore the Board confirms the decision of Council of June 19, 1990, respecting Site 2 as provided by Section 70(5)(a) of the Planning Act and dismisses the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 3rd day of December, A.D., 1990.

MICHAEL G. JOHNSON,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

TURNER v. STELLARTON

PLANNING - L.U.B. AMENDMENT - DEEMED REFUSAL - R-2 TO R-4 - PLANNING ACT, S. 69, S. 70.

Applicant applied to rezone his residential lot to add a one-bedroom unit to the existing two units. Council did not formally deal with application and it was deemed to be refused. Planner and Town officials recommended approval.

HELD: Appeal Allowed.

Intent of M.P.S. is to encourage the conversion of older single family dwellings to multi-family. The proposed conversion meets criteria in the M.P.S. and L.U.B.

NSMB-22-90-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, R.S.N.S. 1989, c. 346 by **STEPHEN TURNER** from a deemed refusal of the Council of the **TOWN OF STELLARTON** to rezone the Appellant's property located at 130 Stellar Street, Stellarton from Residential Single Family (R-2) Zone to Residential Multi-Family Converted (R-4) Zone.

BEFORE: MICHAEL G. JOHNSON, Chairman.

COUNSEL: TRACY ROGERS, Articled Clerk, on behalf of the Appellant;

JOHN BAKER, Q.C., on behalf of the Town.

HEARING DATE: December 10, 1990.

DECISION DATE: December 21, 1990.

DECISION: Appeal Allowed.

DECISION

The subject property is located at 130 Stellar Street in the Town of Stellarton. The property is a single lot located on the West side of the street at its southern end. This end of Stellar Street is a dead-end. Stellar Street has sidewalks on both sides. To the rear of the property is a narrow unpaved street known as Grant Street. The lot has approximately 50 foot frontage on each street with a depth of 278 feet. Many of the neighbouring properties on Stellar Street have established access to the rear of their lots from Grant Street. There are no properties which front on Grant Street and the West side of the street is undeveloped.

Mr. Turner applied to the Town to rezone the property from Residential Single Family (R-2) to Residential Multi-Family Converted (R-4). The rezoning application was made to permit the Appellant to include an additional one bedroom, residential unit in his building.

The present zoning of the subject land is Residential Single Family (R-2) Zone and is designated on the Generalized Future Land Use Map (G.FLUM) as Primary Residential. The lots adjacent to the Appellant's are zoned (R-2) however there are three other properties in the neighbourhood which are zoned Residential Multi-Family (R-3).

There is a large older residential building located on the property. The building currently contains two dwelling units as permitted in an R-2 Zone. There is a smaller one-bedroom unit which is rented to a single occupant. The balance of the house is occupied by the owners, Stephen Turner and his wife.

In a report dated May 1, 1990, the Pictou County District Planning Commission ("Commission") recommended approval of the rezoning.

The Planning Advisory Committee (P.A.C.) for the Town considered this report and the application at its meetings on May 1st, May 29th and June 6, 1990. P.A.C. recommended that the rezoning be approved subject to parking provisions and receipt of letters from neighbours with no objections. These were provided by the Applicant prior to a Council meeting.

At the Council meeting on June 11, 1990, a motion was made to approve the application to rezone the subject property. The motion did not receive a seconder and consequently the motion did not proceed.

Section 69 of the Planning Act deals with Council's failure to deal with a requested amendment to a Land Use By-law. This Section provides that where a Council has failed to commence required advertising within 120 days after receipt of a completed application, such application is deemed to have been refused. The normal 21-day appeal period would apply after this 120 day period. The Applicants' request for a rezoning was deemed to have been refused on July 31, 1990.

On August 13, 1990, the Board received a Notice of Appeal from Stephen Turner.

Mr. Turner testified on his own behalf. He reviewed his plans for the property. He stated that because of the size of the house there were large areas which were not being used by he and his wife. The house is in need of some extensive maintenance and he felt the creation of another small one-bedroom apartment would help defray the cost of this needed maintenance. He stated that his current lease for the existing rental unit stipulated that it was to be occupied by a single person. This stipulation would also apply to the proposed new unit. He said that he had commenced the clearing of a driveway at the rear of his property on Grant Street. He would fully develop this driveway for the additional parking needed should his appeal be successful. There is already provision on his lot for the parking of two cars on Stellar Street. Mr. Turner also stated that his proposal would require no exterior changes to his residence other than the addition of a step and the changing of a window into a doorway.

Mr. Baker called three witnesses on behalf of the Town.

Adrian Pearson, the Town Clerk, gave evidence concerning the preparation of the Appeal Record. He delivered a copy to each of the parties. On instruction of the Town solicitor, Mr. Baker, he also delivered copies to Hugh Muir, Robert Morrison and Adrian and Ruth Kingsbury. These people all had written letters of opposition to Council.

Tony Addis, the Town Engineer, stated that the present sewer and water facilities were adequate to handle the conversion of the building by adding an additional one bedroom residential unit.

Whit Whytewood, the Chief of Police and Traffic Authority for the Town of Stellarton, also gave evidence. He testified that at times on-street parking was a problem on part of Stellar Street because of the Church at the corner and the fact that part of it was a bus route. He agreed that the subject property was close to the dead-end part of the street and does not interfere with traffic flows or the bus route. He also stated that there was or could be sufficient parking provided on the subject property to meet the requirements of the Traffic Authority. Chief Whytewood also agreed with the statement included in the Planner's Report concerning the fact that Grant Street was ploughed throughout the winter, at least to the last driveway in use. He agreed it would be ploughed further if additional driveways were added.

Hugh Gillis is a Planner for the Commission and was the author of the Report dated May 1, 1990, which recommended approval of the rezoning. He reviewed his Report and the reasons for his recommendation. This review included references to Policies 11 and 70 of the Municipal Planning Strategy (M.P.S.) and part 7 of the Land Use By-Law (L.U.B.).

At the evening session held for members of the general public, Ruth Kingsburg was the only witness to apper. She stated that she was there on behalf of not only herself but her husband and Robert Morrison who were both unable to attend because of shift work. She also presented and read a letter from Hugh Muir which outlined his objections to the proposed project. She stated that her objections and those of whom she represented were very similar to those expressed by Mr. Muir. The Board will review Mr. Muir's comment later in this decision.

The Board has reviewed the provisions of Section 69 of the Planning Act. Council did not commence the procedure required for amendment to the L.U.B. by publishing the required advertising by the required date of July 31, 1990. The Board is, therefore, of the opinion that Council is deemed to have made a decision to refuse the rezoning application on that date.

Section 70(4) of the Planning Act instructs the Board to "determine whether the decision of the Council reasonably carries out the intent of the Municipal Planning Strategy".

Section 70(6) restricts the Board from allowing the appeal unless it determines "that the decision of the Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy."

Part (b) of the housing section of the M.P.S. is concerned with converted dwellings. It is very clear from a reading of the preamble to Policies 9, 10 and 11, that the intent of the M.P.S. is to encourage the conversion of older single family dwellings to multi-family dwellings. The preamble contains such phrases as "preserving the visual character of existing neighbourhoods", "adds to the overall character of the Town", "maintains a sense of stability", "conflicts due to parking or traffic are minimal", "cost savings for the Town", "increase their income to help pay the maintenance costs".

The preamble also makes it very clear that "the structural appearance of the original building should not be altered in any way which detracts from the original design as a single family home", thus limiting the scale of the development and its affects on the neighbourhood. The preamble also refers to tenant parking at the rear or side of the lot. It also requires the existence of Municipal services.

Policy 11 of the M.P.S. clearly sets out the required criteria to meet the intent expressed in the preamble. It states as follows:

> "Land designated PRIMARY RESIDENTIAL in this Strategy or zoned RESIDENTIAL SINGLE FAMILY (R-2) in the Land Use By-law may be zoned RESIDENTIAL CONVERTED (R-4) by amendment to the Land Use By-law to permit the conversion of a single family home to 3 or more apartment units. Such an amendment shall be subject to the following criteria:
>
> a) no additions or alterations are proposed for the exterior of the building which would change the roof line, or exterior of the building in such a way as to significantly detract from its appearance as a single family dwelling; and
>
> b) the property can accommodate a converted dwelling without having a severe negative impact on adjacent land uses by virtue of increased traffic, sewage flows, or water demands."

The evidence shows that the proposed conversion clearly meets the above criteria. No additions or alterations are proposed which would change the roof line or exterior of the building in a significant way.

The evidence of the Chief of Police was that the addition of another one bedroom residential unit would have no significant impact on traffic flow. The property is located near the dead-end of the street and is not affected by a bus route which uses the other part of the street.

The evidence of the Town Engineer was that the sewage and water services are adequate to handle the conversion.

Policy 70 of the M.P.S. sets out additional criteria which Council must have regard to when considering an amendment to the L.U.B. These are as follows:

> "a) the proposed amendment is in conformance with the intent of the MUNICIPAL PLANNING STRATEGY and the requirements of the Land Use By-law and all other Town By-laws and regulations;
>
> b) proposal is not premature or inappropriate by reason of:
>
> i) the financial capability of the Town to absorb any costs related to the development, or
>
> ii) creating a ribbon or scattered development pattern as opposed to compact development."

In the Board's opinion the evidence shows that the Appellants proposal is in conformance with the intent of the M.P.S.

The evidence also shows that the proposal is not premature or inappropriate for any of the reasons listed above.

Part 7 of the L.U.B. sets out various requirements respecting permitted uses, lot size, set-back, services, alterations and parking which are required for a Residential Multi-Family Converted (R-4) Zone.

The Appellant's proposed conversion meets all of these requirements with the exception of a 6-foot side yard on each side of the building. One side of the building only has a four foot side yard. However, Part 3 Section 7 of the L.U.B. would still permit such a development. This Section exempts buildings in existence prior to the adoption of the L.U.B. from lot area, frontage, set-backs and servicing requirements. The subject building was in existence prior to the adoption of the L.U.B.

The Board has reviewed the letter from Mr. Muir. In the first part of his letter he refers to such topics as "benefits to the residents of Stellar Street", "upgrading the lifestyle" and the "rejuvenation of the street with younger families with young children". The Board interprets these arguments of Mr. Muir to show that the intent of the residents of the Street would be against the development of additional apartment units and existing buildings. However, this intent of some of the residents of the street is clearly not the same intent expressed in the preamble included in the M.P.S. It may be that the position of the residents of the Town of Stellarton towards neighbourhoods such as found on Stellar Street has changed over the years. If this is in fact the case then perhaps a review of the M.P.S. is needed. Without such a change the Board cannot accept Mr. Muir's line of argument.

Mr. Muir expressed a fear that property values would decrease. No evidence was offered to support this. In fact, it appears to the Board that the intent of Policy 11(a) is to directly minimize such a potential problem.

The remainder of Mr. Muir's letter deals with parking and traffic problems. It also appears to the Board that his complaint about blockage of the sidewalk area by vehicles would appropriately be handled by parking tickets issued by the Town Police and are not directly a zoning problem. Access to the rear of Stellar Street lots, via Grant Street is already being used by many of the residents. Evidence has shown that Grant Street is ploughed as far down as the last driveway which is in use. It was also stated that Grant Street would be ploughed to Mr. Turner's lot should he establish an appropriate driveway. The evidence of the Chief of

Police concerning parking and traffic at the dead-end portion of the street is in direct contradiction to the statements made by Mr. Muir in his letter. From its own observation of the site, the Board prefers the evidence of the Chief of Police to the opinions expressed by Mr. Muir in his letter.

The Board is of the opinion that the proposed conversion carries out the intent of the M.P.S. and meets the various criteria included in the M.P.S. and the L.U.B.

Before the Board can allow the appeal, it must examine Council's decision to determine if it can reasonably be considered to carry out the intent of the M.P.S. Policy 11 of the M.P.S. is a discretionary policy. However, Council must have some adequate planning reason for refusing an application if its decision is to be upheld on appeal.

The Board has looked at the Minutes of the July 11, 1990, Council Meeting which show the following:

- Three letters were before Council, one in favour, one neutral and one with six signatures opposing.

- Mr. Gillis recommended approval and noted that the rezoning met all the requirements of the L.U.B.

- Mr. Gillis explained the definition of a Zone (R-4)

- Mr. Muir was present and stated that residents should be contacted prior to changes.

Mr. Baker, in his closing argument, stated that he had contacted all Councillors and that he understood their reasons for not proceeding related solely to parking and opposition by some of the residents of the street.

Evidence shows that there were two other opposing letters before Council. The names on the three single letters of opposition, Muir, Kingsbury and Morrison, were also included on the opposing letter with six signatures.

The Board is of the opinion that the above considerations do not show sufficient cause for Council to ignore the recommendations of the Planner and P.A.C. The parking situation was adequately responded to. Although the wishes of residents of the neighbourhood are important and must be considered by Council and the Board they alone cannot be considered sufficient cause for refusal of an application which otherwise meets the intent of the M.P.S. In the circumstances of this case it would be necessary for Council to amend the M.P.S. and change its intent in order to meet the wishes of the opposing residents of the neighbourhood.

The Board determines that the decision of Council cannot reasonably be said to carry out the intent of the M.P.S.

As provided by Section 70 (5)(c) the Board allows the Appeal and instructs Council to amend the Land Use By-law by rezoning the subject property to Residential Multi-Family Converted (R-4).

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 21st day of December, A.D., 1990.

MICHAEL G. JOHNSON
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

RE: COUNTY OF ANTIGONISH

MUNICIPAL BOUNDARIES - POLLING DISTRICTS - MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 16.

Application by County to divide a polling district into two and confirm the boundaries and number of councillors in other polling districts. In the 1988 periodic review Board recommended amendments. In 1988 election voter inequalities had diminished to some extent.

HELD: Application allowed.

Polling District 9 is smaller in geographic size, has a large voter population and a community of interest. This makes it undesirable to divide the District at this time.

NSMB-1-90-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Application under Section 16 of the Municipal Boundaries and Representation Act R.S.N.S. 1989, c. 298 by the MUNICIPALITY OF THE COUNTY OF ANTIGONISH.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: DONALD MacDONALD, LL.B., for the Municipality;

HEARING DATE: June 11, 1990.

DECISION DATE: June 28, 1990.

DECISION: Application Granted.

DECISION

Pursuant to Section 16 of the Municipal Boundaries and Representation Act the Municipality of the County of Antigonish applied to the Board to divide Polling District 4 into two polling districts with one councillor each. In addition the Municipality applied to confirm the boundaries and the number of councillors in Polling Districts 7, 8 and 9.

In a decision dated March 3, 1988, pursuant to Section 17 of the Act, the Board recommended that the Municipality divide Polling District 4 into two districts and consider amending the boundaries of Polling Districts 7, 8 and 9 to ensure more equal representation in the number of voters per councillor.

Following the 1988 decision, a municipal election was held in October, 1988. Election results indicate there has been a shift in population within the Municipality. Inequalities in voter representation have diminished to some extent.

District 4 borders on the Town of Antigonish. It has the largest voter population in the Municipality. For many years two councillors have represented this District.

In December, 1989, the Municipal Boundaries Review Committee recommended Council make application to divide District 4 into two polling districts. In recommending a boundary between the amended District 4 and the proposed District 10, the Committee took into account the existing vacant serviced land in the area and the current population. The Committee felt there would be more growth in the proposed District 10 because it has a larger amount of vacant serviced land that the proposed District 4. The proposed boundary results in a greater voter population in District 4 than in the proposed District 10.

The proposed boundary between Districts 4 and 10 runs in part along Highway 104. District 4 lies north of the highway and District 10 lies south of the highway. The boundary then runs across country to join Highway 7.

District 9 borders the Strait of Canso. It is smaller in geographic size than the other polling districts. It has the second largest voter population. Many of its residents work in the Strait area. There is a community of interest in District 9. This makes it undesirable to divide the District at this time. The voter population in District 9 declined in the 1988 election. The percentage variation in the number of voters per councillors from the average was +39.3% in 1985. In 1988 it was +32.8%.

In preparing for this application the Municipal Boundaries Review Committee made projections of the number of voters in the polling districts based on the increases in the number of residential units per polling district in 1988/89. The projection for Polling District 9 predicts a further reduction in the percentage variation from the average to +30.73%.

The following chart shows the voter statistics and the percentage variation in the number of voters per councillor for the 1985 and 1988 election and the 1989 projected figures.

VOTER STATISTICS AND PERCENTAGE VARIATION

DISTRICT NUMBERS	1985 VOTERS	%	1988 VOTERS	%	1989(Projected) VOTERS	%
1	698	(19.8)	651	(27.9)	685	(26.9)
2	766	(11.9)	729	(18.2)	767	(18.14)
3	707	(18.7)	713	(20.1)	741	(20.9)
4	1906	19.1*	2035	14.0*	1161	23.9
5	698	(19.8)	779	(12.7)	822	(12.27)
6	989	13.7	1005	12.7	1057	12.8
7	738	(15.2)	767	(14.0)	785	(16.22)
8	987	13.4	1055	18.2	1099	17.28
9	1212	39.3	1185	32.8	1225	30.73
10					1034	10.35
TOTAL VOTERS	8701		8919		9376	
AVG. VOTERS PER COUNCILLOR:	870		892		937	

*DISTRICT 4 HAD 2 COUNCILLORS

The Board is satisfied that the Municipality's application should be granted. District 4 should be divided into 2 polling districts as described in Schedule "A", with one councillor each. The boundaries of the remaining polling districts and the number of councillors are confirmed.

The Board will issue an Order dividing Polling District 4 into two polling districts, one numbered 4 and the other numbered 10 and confirming the boundaries and number of councillors of the remaining polling districts. The Order will not take effect until 1991. For purposes of the triennial election it will come into effect on January 1, 1991 and for all other purposes it shall take effect on the first day of the first meeting of the Council after the election of Municipal Councillors for the year 1991.

DATED at HALIFAX, Nova Scotia, this 28th day of June, A.D., 1990.

LINDA GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

SCHEDULE "A"

DISTRICT NO. 4

BEGINNING, at a point on No. 7 Highway near or at Gaspereaux Lake;

THENCE, following No. 7 Highway in a Northeasterly direction to the intersection of the highway and Pitcher's Farm Road (so-called);

THENCE, in a Northeasterly direction in a direct line from said point to the point of intersection of the Northern limit of Lower West River Road, and the Western boundary of lands now or formerly of John W. Bowie described in Book 199, Page 270 at the Antigonish Registry of Deeds;

THENCE, in an Easterly direction, along the Northern limit of Lower West River Road, a distance of 800 feet, more or less, to the intersection of said Northern limit of the road and the Eastern boundary of said Bowie lands;

THENCE, in a Northerly direction, in a direct line, from said point to that point on the Southerly limit of the Trans-Canada Highway that is 1,600 feet, in an Easterly direction from the point of intersection of the Addington Forks Road, (also known as West River Road) and the Trans-Canada Highway;

THENCE, in an Easterly direction along the Trans-Canada Highway to the Western boundary line of the Town of Antigonish;

THENCE, in a Northerly direction along said Western boundary line of the Town, and in an Easterly direction along the Northern boundary of the Town to the intersection of said boundary line with the Wrights River;

THENCE, from said intersection Northwardly in a direct line to the intersection of Cloverville Road with the Big Marsh Road;

THENCE, from said intersection Southwesterly in a direct line to Crown Post No. 3104 near Brown's Mountain;

THENCE, Southeasterly in a direct line to the point of beginning, said line crossing Old No. 4 Highway at or near the intersection of said Highway with Back Road Brierly Brook.

DISTRICT NO. 10

BEGINNING, at the intersection of No. 7 Highway and the Glen Road;

THENCE, Southwardly along the Glen Road to the place where it is intersected by a branch of the South River called the Big Brook;

THENCE, Southeasterly to a point on the Dunmore baseline, said point being the Northeast corner of District No. 3;

THENCE, Northeastwardly to a point on No. 4 Highway at Jack's Brook;

THENCE, following the baseline of Williams' Point lots to the waters of the South Arm of Antigonish Harbour;

THENCE, following the various courses of the shoreline of Antigonish Harbour in a Northwesterly direction and crossing Antigonish Harbour to strike the Western bank of the mouth of the North River;

THENCE, Southwestwardly along the shoreline of Antigonish harbour until it comes to the mouth of the West River;

THENCE, along said West River upstream to McAmis' Bridge and continuing to the Trans-Canada Highway;

THENCE, following the Trans-Canada Highway in a Westerly direction to the point of intersection of the Southern and Western boundary lines of the Town of Antigonish;

THENCE, continuing along the Trans-Canada Highway in a Westerly direction to a point that is 1,600 feet East of the intersection of Addington Forks Road (also known as West River Road) and the Trans-Canada Highway;

THENCE, in a Southerly direction, in a direct line from said point to the point of intersection of the Northern limit of Lower West River Road and the Eastern boundary of lands now or formerly of John W. Bowie described in Book 199, Page 270 at the Antigonish Registry of Deeds;

THENCE, in a Westerly direction, along the Northern limit of Lower West River Road a distance of 800 feet, more or less, to the intersection of said Northern limit of the road and the Eastern boundary of said Bowie lands;

THENCE, in a Southwesterly direction in a direct line from said point to the intersection of Pitcher's Farm Road (so-called) and No. 7 Highway;

THENCE, in a Southwesterly direction along No. 7 Highway to the place of beginning.

RE: COUNTY OF HALIFAX

MUNICIPAL BOUNDARIES - POLLING DISTRICT BOUNDARY AMENDMENT - MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 16.

The County applied to amend the two boundaries between four polling districts. The effects of the proposed boundaries were minimal.

HELD: Application Allowed.

NSMB-3-90-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Application under Section 16 of the Municipal Boundaries and Representation Act by the MUNICIPALITY OF THE COUNTY OF HALIFAX to amend the boundary between Polling Districts 8 and 9 and the boundary between Polling Districts 7 and 25.

BEFORE: MICHAEL G. JOHNSON, Chairman,
LINDA D. GARBER, Vice-Chairman,
RICHARD L. WELDON, Member.

COUNSEL: ROBERT CRAGG, Q.C., on behalf of the Municipality.

HEARING DATE: December 5, 1990;

DECISION DATE: December 17, 1990.

DECISION: Application Allowed.

DECISION

The Municipality of the County of Halifax applied to amend the boundary between Polling Districts 8 and 9 and Polling Districts 7 and 25 pursuant to Section 16 of the **MUNICIPAL BOUNDARIES AND REPRESENTATION ACT**. The reason for the application is to correct the two boundary lines to reflect the understanding of the residents as to which polling district they reside in and to ensure that the boundary does not cut across property lines.

With respect to the boundary between Polling Districts 8 and 9, the existing boundary followed a line that is no longer easily found. The proposed boundary will follow Highway 107 in part.

The proposed amendment will result, based on the 1988 voting statistics, in an increase of 5 voters in District 8 and a corresponding decrease of 5 voters in District 9 as shown in the following chart:

Polling District	Existing	Proposed
District 8	4,189	4,194
District 9	4,341	4,336

With respect to Polling Districts 7 and 25 the existing boundary cut through a part of the Department of Housing's development, Forest Hills, as well as the lands of individual property owners.

The proposed boundary follows property lines and places all of Forest Hills in District 7. Fourty-four acres of land will be transferred to District 7 and 1 acre to District 25.

The proposed amendment will result, based on 1988 voting statistics, in an increase of 45 voters in District 7 and a corresponding decrease of 45 voters in District 25 as shown in the following chart:

Polling District	Existing	Proposed
District 7	2,709	2,754
District 25	4,098	4,053

Polling District 7 has one of the smallest number of voters in the Municipality. It is anticipated that this will change with further development of Forest Hills.

The Board approves the proposed boundary amendments and allows the application.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 17th day of December, A.D., 1990.

MICHAEL G. JOHNSON,
Chairman,

LINDA GARBER,
Vice-Chairman,

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

RE: RESIDENTS OF CONQUERALL BANK

VILLAGE SERVICES - APPLICATION FOR VILLAGE STATUS - BEST INTERESTS OF THE INHABITANTS - VILLAGE SERVICE ACT, S. 4, 15(1).

Ratepayers requisitioned Sheriff to hold a poll to determine if Village Service Act should apply to Conquerall Bank. Of 227 resident ratepayers eligible to vote 68 did with 57 voting for village status. Residents thought village status would prevent annexation and would permit local planning control. At Board hearing most persons in attendance were against village status.

HELD: Application Dismissed.

The word "village" and "area" are used to mean the same thing in the Act. In this case the area constituted a village.

The evidence presented at the hearing did not satisfy the Board that granting the application would be in the best interests of the inhabitants. This is a different question than that determined by the Sheriff's vote. That vote determined that the majority of those voting were in favour of village status. The Board may in making its decision consider the wishes of the majority of voters. The Board is not necessarily bound by that majority. A majority vote based on false premises may not be in the best interests of the inhabitants of the area.

Many residents were not aware that a Poll was being conducted. There is no requirement under the Act for a public meeting prior to the vote. There is no traditional village centre in Conquerall Bank and it is questionable if there are five prominent places for posting notices. Board recommends that the Act be amended to allow better public information and participation.

NSMB-1-90-VSA

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Application under the Village Service Act, R.S.N.S. 1989, c. 493, by certain Residents of Conquerall Bank for Village status under the Village Service Act.

BEFORE: MICHAEL G. JOHNSON, Chairman,
LINDA D. GARBER, Vice-Chairman,
RICHARD L. WELDON, Member.

HEARING DATES: June 8, 1990,
June 25, 1990.

DECISION DATE: July 31, 1990

DECISION: Application Dismissed

DECISION

This is an application by certain residents of Conquerall Bank, an area near the Town of Bridgewater, seeking an order that the Village Service Act, R.S.N.S. 1989, c. 493, apply to Conquerall Bank.

Conquerall Bank is a community of approximately 500 people located on the west side of the LaHave River, bordering on the Town of Bridgewater.

The Chairman, under Section 16(1) of the Municipal Board Act R.S.N.S. 1989, c. 297, designated all three members of the

Board to sit on the hearing of this application.

All matters necessary to the jurisdiction of the Board have been proven to the satisfaction of the Board. No one took objection to the Board's jurisdiction to hear the application. The Board therefore finds on the facts that the Board has jurisdiction to hear the application.

The Board makes the following findings of fact:

1. An informal meeting was held in the Fire Hall prior to the conduct of the Poll but this meeting was not widely advertised.

2. More than 25 ratepayers of the area signed a "Requisition" dated January 9, 1990, to the Sheriff of the County of Lunenburg "That the petitioners are desirous that the Village Service Act be declared to apply to the village or district of Conquerall Bank which is bounded and described as follows ..." and that the Sheriff conduct a poll "to determine whether or not said Act shall be declared to apply to the village or district of Conquerall Bank".

3. The Requisition made to the Sheriff says the "village or district" of Conquerall Bank contains an area not less than 3,000 acres on which there resides not less than 400 "residents and ratepayers". The area is outlined in yellow on a map Exhibit C-3, presented to the Board. It runs along the west bank of the LaHave River from the boundary of the Town of Bridgewater downstream

to the sea. The Requisition was signed by 76 persons residing within the boundaries shown on the plan. At least 25 of these signatories were ratepayers resident in the area.

4. After receipt of the requisition, the Sheriff consulted with David Steele, Chief Administrative Officer (C.A.O.) of the Municipality of the District of Lunenburg (the Municipality) concerning the number of voters and the number of inhabitants of the "village or district".

5. Mr. Steele assisted the Sheriff by providing him with the Municipality's latest municipal voters list and a list of the ratepayers which the Sheriff used to prepare the list of persons eligible to vote at the requisitioned poll.

6. The Sheriff prepared a "Notice of Poll", calling for the poll to be held March 17, 1990.

The Notice of Poll is set out in full to indicate what information it contained:

"PURSUANT TO VILLAGE SERVICE ACT
DISTRICT OF CONQUERALL BANK
ELECTION DATE: MARCH 17, 1990
DISTRICT NO. 13
POLLING STATION: FIRE HALL
CONQUERALL BANK

IF YOUR NAME APPEARS ON THIS LIST YOU ARE ELIGIBLE TO VOTE IN THIS ELECTION.

HOURS OF THE POLL: 8:00 a.m. to 6:00 p.m."

7. The Sheriff posted that "Notice of Poll" in five

places in Conquerall Bank which he considered prominent and advertised the poll in the newspaper, the Bridgewater Bulletin.

8. The Sheriff then appointed persons to conduct the poll and arranged for the preparation of ballots for the proposed poll.

9. These persons, under direction of the Sheriff, conducted the poll on March 17, 1990, between the hours and at the place set in the "Notice of Poll".

10. On that date the Sheriff completed a statement of poll. There were 227 resident ratepayers eligible to vote at the poll. Sixty-eight voted. There were two spoiled ballots. These were not counted for either side. Fifty-seven people voted "for" the application of the Village Service Act to the area. Nine people voted "against".

11. The Sheriff consulted again with Mr. Steele and by letter dated March 22, 1990, made his report to Mr. Steele.

12. Mr. Steele, by letter of March 26, 1990, forwarded the bundle of papers comprising the Sheriff's report to Mrs. Fran Robertson, a solicitor with the Department of Municipal Affairs, which was received in Halifax on March 28, 1990.

13. Mrs. Robertson, forwarded the complete package to the Board, by letter dated April 3, 1990, received April

12, 1990,

14. The Clerk of the Board contacted Mr. Steele and the Sheriff and then dealt with Donald Bruhm as the contact person for the application.

15. The Clerk prepared, circulated and arranged for publication a "Notice of Hearing" in accordance with Section 25(1) and 27(2) of the Municipal Board Act dated May 8, 1990.

16. On June 8, 1990 at 10:00 a.m. the Board commenced its hearing. The Board raised certain questions as to definitions found within the Act. No one else had any preliminary objections. Mr. Steele explained that the Municipality was neutral to this application. Mr. Bruhm was asked to give evidence. The Board also heard evidence from the Sheriff, Mr. Steele and other persons in attendance

17. The proponents of village status under the Act advocated it for two main reasons:

1. Village status under the Act would enhance the ability of the persons in the "village or district" to resist any efforts by the Town of Bridgewater to annex, in whole or in part, the "village or district". The people referred to the feared action of the Town of Bridgewater as "expropriation".
2. Village status would allow the inhabitants of

the area to zone the "village or district" for planning purposes.

18. At the conclusion of the morning session, the Board felt the residents of Conquerall Bank needed more information about the effect of the Village Service Act. The Board also felt that it needed more information. The Board asked the Fire Chief to bring information he had concerning the number of inhabitants of the area. The Board asked the spokesperson for the pro-village forces, Mr. Bruhm, to provide the Board with the names of three persons willing to serve as the initial village commissioners.

19. The Board adjourned the hearing to allow for an Information Meeting for the community to be held at the Fire Hall in Conquerall Bank on June 25, 1990, at 7:00 p.m. to be followed by a continuation of the Board hearings. The Board stipulated that the Notice of the Information Meeting and the Hearing be delivered door-to-door to all houses located within the proposed boundaries.

20. The Chairman asked the Department of Municipal Affairs to contribute personnel for the Information Meeting in accordance with Section 12 of the Municipal Board Act.

21. The Clerk drafted a new Notice to advertise the Information Meeting and the continuation of the hearing.

She attached to this notice a one page outline on the Village Service Act provided by the Department of Municipal Affairs. [See Schedule "A"] She sent copies of the Notice and attachment to Mr. Bruhm for distribution.

22. Mr. Bruhm caused these new notices to be delivered.

23. The Chairman chaired the Information Meeting. A three page handout prepared by Municipal Affairs was distributed [See Schedule "B"]. Mark Gilbert, a municipal advisor, represented the Department of Municipal Affairs on the panel. Other members of the panel were Deputy-Warden Pauline Himmelman who is the Councillor for the area, Mr. Steele and Francene Romney, Municipal Solicitor.

24. After the Information Meeting adjourned, the Board resumed its hearing. As part of the evidence the Board was advised there are 199 residences occupied by 512 individuals within the proposed boundaries of the village.

25. At the conclusion of the hearing the Board called for a show of hands of those for and those against the application. The Clerk and Mr. Steele conducted the count. Two of those present abstained. Fifty-seven voted against the application. Six voted for the application. This appeared to be all those people from the community then present.

26. The Chairman advised those persons who wished a copy of the decision to leave their name and address with the Clerk. Twenty persons did so.

27. The Board reserved its decision and concluded the hearing.

Prior to being amended, the Village Service Act R.S.N.S. 1967, c. 329, had a similar requisition process as today (and as was conducted by the Sheriff in this requisition). However, following a vote in favour, the approval of application of the Village Service Act was semi-automatic by the Governor-in-Council. It issued a proclamation in the Royal Gazette which:

1. Set the date when the Act should apply to the Village.
2. Defined the boundaries of the village.
3. Appointed the three initial village commissioners.

There was no review beyond this.

Today there is no automatic approval. The Board is required to hold a hearing to determine if it is in the best interests of the inhabitants of the area before ordering that the Act applies. This is a major difference. In Schedule "C" the Board highlights certain sections and excerpts from the Village Service Act.

The Board has dealt with the Village Service Act only a few times in the Board's existence. The Board will cite each previous case and examine it to determine if any of the previous cases have guidance for the Board in this application.

Allan E. Skidmore et al v. Village of Kingston (1985), 4-B M.B.D. 533 was an early application to remove an area from a village. The test on removal from a village to be applied by the Board was whether the withdrawal from the village was "in the best interests of the inhabitants of the area." Some confusion arose as to whose best interests, those of the inhabitants of the whole village, or merely those of the area seeking to secede from the village.

The Board decided, in determining "the best interests of the inhabitants of the area under the Village Service Act, it could not use the criteria for altering municipal boundaries set out in some detail in the Municipal Boundaries and Representation Act". This decision was made even though the Village Service Act is remarkably bereft of any particular assistance in defining "best interests".

The Board in Skidmore found these factors of "best interests":

1. Injustice when most inhabitants learned they had been incorporated into a village when they received their first tax bill [the subdivision in question had been unoccupied during the village making process.]
2. The secession simplified municipal jurisdictions since the area seceded was in one municipality while the remainder of the village was in another.
3. The established village commission was unwilling to voluntarily alter its boundaries.

4. The main municipality was able to provide the village services at competitive prices.

5. The inhabitants would be freed from additional taxation which was imposed by the village.

The Board had perused the initial petition submitted and had requested appropriate amendments prior to the hearing. Experienced counsel, well briefed, opposed the application. Strong proponents for secession had prepared themselves well for presenting their point of view to the Board.

Certain Ratepayers of Waverley (1986), 5-B M.B.D. 743 was a highly prepared application since the proponents originally faced opposition from the City of Dartmouth and concerned scrutiny from the Town of Bedford and the Municipality of the County of Halifax, the concerned municipality. All these parties initially hired experienced counsel. The proponents of village status prepared thoroughly with historical studies and statistics relevant to their application. They expressed a strong sense of community in their evidence and they negotiated their original opponents out of the picture so that their presentation became a parade of witnesses in favour of the application.

The test the Board applied here was "the best interests of the inhabitants of the area". Criteria the Board used in their positive determination of the Waverley application included:

1. Waverley had a sense of community. The inhabitants felt that granting of village status legitimized what those inhabitants had always considered Waverley to be.

2. Village status was a natural progression or evolution towards more local autonomy and input into [political] decision making.

3. The village would now have legally defined boundaries. Various governmental bodies had, from time to time, shifted village road markers and the like and had caused some local confusion.

4. The area, now identified, was accepted by other governing bodies. This would improve co-operation, rather than rivalry, among all these bodies.

5. It was preceded by an incorporated ratepayers association with some taxing powers which initiated and supported the village application [and its own demise] as an improvement in local government.

Village of Brooklyn (1986), 5-B M.B.D. 731 was an application to reduce the uncertainty of a village boundary. Again the statutory test for the Board was "the best interests of the inhabitants of the area". No one opposed the application.. The detailed reasons for the boundary were accepted by the Board.

Village of Milton (1988), 7-B (Vol. II) M.B.D. 954 was an unopposed application of a village to have its boundaries more fully described. The Board conceded the ambiguities and uncertainties cited in the application. It adopted, as the current village boundaries, the boundaries of two polling divisions whose boundaries had, in turn, just been set by the Board in an application under the Municipal Boundaries and Representation Act.

The Board noted, in passing, that the village boundaries, so set, would not automatically change with any subsequent alteration in the polling division boundaries under the Municipal Boundaries and Representation Act.

There are no other decisions of the Board under the Village Service Act.

Section 4 of the Village Service Act deals with the ratepayers and inhabitants of a "village". The Act does not define "village" in its definition clause. For the purpose of an application to declare the Act to be applied to a village the village must contain at least 101 persons (Section 3 of the Village Service Act). It must contain at least 1 resident ratepayer [Section 4(1) and 2(g) of the Village Service Act] and have some area.

The Act provides no other direct description of what constitutes a village.

A glance at the map [Exhibit C-3] shows the proposed area is only a portion of a polling district of the Municipality, set in accordance with the Municipal Boundaries and Representation Act. (In Milton there were two such polling districts). The area proposed is merely one polling division, being a subdivision of a polling district. The boundaries of this polling division are determined by the returning officer in accordance with the Municipal Elections Act R.S.N.S. 1989, c. 300, with special reference to Section 9.

The proposed area contains 3 roads along which ribbon development has occurred. The vast percentage of its 3000 acres are internal to these roads and uninhabited. The map contains the name "Conquerall Bank" and, as well, the name "High Head" within the proposed boundaries.

"Village" is defined in The Random House College Dictionary, First Edition, Revised Edition:

> "1. a small community or group of houses in a rural area, usually smaller than a town and sometimes incorporated as a municipality...".

In the Compact Edition of the Oxford English Dictionary, 1971 "Village" is defined as:

> "1. A collection of dwelling-houses, forming a centre of habitation in a country district; an inhabited place larger than a hamlet and smaller than a town, or having a simpler organization and administration than the latter."

Black's Law Dictionary, Fifth Edition, defines "village" as follows:

> "Traditionally word "village" has connoted an area possessed of some attributes of a community, and is not a technical word, or one having a peculiar meaning, but is a common word in general usage and is merely an assemblage or community of people, a nucleus or cluster for residential or business purposes, a collective body of inhabitants, gathered together in one group... .
>
> In some states [this is an American source], this is the legal description of a class of municipal corporations of smaller population than "cities" and having a simpler form of government, an corresponding to "towns" and "boroughs" as these terms are used elsewhere".

The Board must determine what the legislature intended when it used the word "village" in Section 4 of the Village Service Act. It must then determine whether the proposed area constitutes a "village" within that meaning.

The evidence given does not sustain the phrase "forming a centre of habitation" included in the Oxford definition. If the proposed area is to be defined as a village at the time of the requisition, the Board must find its definition of "village" elsewhere.

Random House definition [American source] of "village" is not hostile to including the proposed area in that definition.

The Board believes the Legislature intended to use the broad definition of "village" contained in Black's in Section 4 of the Village Service Act (as modified by Section 3 of the Act) "...not a technical word...merely an assemblage or community of people..." who wish to make that assemblage more formal by the processes of the Act. This tendency to accept this broader definition is supported by Section 4(2) which uses the phrase "proposed village" and refers to a Statutory Schedule Form A "village or district of...". This phrase is repeated in Schedule Form C.

Section 15(1) of the Act uses the word "area" and "village" as if they meant the same thing. The land in question is certainly an "area".

This broader interpretation of legislative intent allows the Board to give a remedial interpretation of the Village Service Act in compliance with Section 9(5) of the Interpretation Act R.S.N.S. 1989, c. 235.

For these reasons the Board is satisfied that the area described in the requisition, at the time of the requisition, constituted a "village" within the meaning of Section 4(1) of the

Village Service Act.

The Board is satisfied as a matter of fact that the village contains at least a population of over 100 "persons" as required by Section 3 of the Act.

More than twenty-five "ratepayers" of the village signed the requisition to the Sheriff. (Section 4 of the Act).

The Board is satisfied that the minimum requirements have been met from requisition, to poll, to Board Hearing as specified in the legislation.

The purpose of the vote requisitioned in Section 4(1) of the Act is stated thus "...to hold a poll of ratepayers of the village...to determine whether or not a majority of the inhabitants thereof..." favour village status.

Under the previous 1967 legislation, a positive vote properly conducted resulted in village status [subject, perhaps, to some discretion in the Minister]. The legislature did not change the wording of this Section. It removed the possible discretion of the Minister and replaced it with the Board's determination under Section 15 of the Act.

Therefore, in the Board's opinion, the poll conducted herein by the Sheriff among the "ratepayers" [meaning "resident ratepayers" in the Act] did what the legislature intended. The vote of the "resident ratepayers", as small as the turnout was, determined a majority of the "inhabitants" were in favour of the Act being declared to apply to the village.

There is no statutory authority for the Board to question this result, which is final. Any subsequent vote taken is merely a straw vote and cannot change the decision of the vote of the resident ratepayers, legally arrived at.

The Board must then proceed to a hearing to determine if it "appears to the Board to be in the best interests of the inhabitants of the area it shall order that the Act shall apply to the village".

At the first Board hearing, the proponents of the village status heard explanations from Mr. Steele that village status would not give them any more protection against hypothetical annexation by Bridgewater and could give them no assistance in planning.

At the subsequent Information Meeting, the Department of Municipal Affairs circulated a three page information handout which the Board commends to all who are considering an application of the Village Service Act to their community (See Schedule B to this decision). The contents were explained, in a neutral manner, by the departmental official present. He and other panellists responded to questions from the floor. Mr. Steele reiterated that the Municipality could provide all the services that a village could provide, and that the village would provide no extra legal protection against any Bridgewater attempt at annexation.

The Chairman, while remaining neutral, tried to indicate that this particular piece of information, while legally correct, might not necessarily be the whole story on an annexation.

The evidence presented at both hearings has not satisfied the Board that the granting of the application would be in the best interests of the inhabitants of the area. This is a different question than that determined by the requisitioned vote conducted by the Sheriff. That vote determined that the majority of those voting were in favour of the application of village status to the village. The Minister was formerly, essentially, bound to grant the status the majority wanted. The Board may in making its decision, consider the wishes of the majority of voters, as determined by the sheriff's requisitioned poll. The Board is not necessarily bound by the official wish of that majority. The Board must determine what appears to it to be in the best interests of the inhabitants of the area.

The Board is not satisfied that village status is in the best interests of the inhabitants.

The presentations made to the Board and the questions asked at the information session, and the show of hands taken at the final part of the Board hearing, satisfied the Board that the proponents of the application had embarked on the application here with little understanding of the consequences of the application.

The proponents of the application were unable to inform, accurately, the persons who they were soliciting to sign the requisition the issues involved. The Board heard evidence from persons who said they had signed the requisition because of misinformation given them by the persons presenting the requisition to them for signature. Thus the signers of the requisition were less informed than they should have been. The Board does not mean to suggest or imply that the proponents acted in any way with malice or intent to deceive. They acted in good faith.

The Board concedes that in our democratic society organized by law, each voter at a duly called election has duty to inform himself on the issues involved and to vote his wishes after he has studied the issues. His vote, given those duties, made by secret ballot and according to the legal constraints surrounding the election, is deemed to be informed. The Board recognizes the right of each voter not to vote in a given election. In this election, the majority of resident ratepayers entitled to vote did not vote.

Such an application, even though supported by the majority of the voters mainly based on false premises cannot be in the best interests of the inhabitants of the area.

The Village Service Act as drafted, does not require any public meetings about village status prior to the vote being taken. The drafters of the Act assumed there would be five "prominent" places within the proposed village where residents could see the Notice of Poll. The drafters may also have assumed that prior to a Poll being held there would be general discussion among the inhabitants about village status. In the previous village applications heard by the Board there has been such general discussion.

In this case, many residents were not aware that a Poll was being conducted. Some residents felt that there were not five "prominent" places in the area for posting notices. There does not appear to have been much general discussion about the application.

Conquerall Bank does not have a traditional village centre. The residences run along three major roads. Some residents do attend functions at the Fire Hall, one of the five prominent places, on a regular basis, while others do not.

The assumptions which appear to underly the Village Service Act are false at least with respect to Conquerall Bank. Some residents were upset that matters had proceeded so far along before they were even aware that an application had been made.

If the application were successful, the Village Commissioners have the power to impose rates, in effect an additional level of taxation.

In the Board's opinion, the Legislature should consider amending the Village Service Act to require that additional information and more adequate notice is given residents prior to the conducting of the Poll. Those persons who requisition the Sheriff could be required to give each household within the boundaries of the proposed village a copy of the Notice of the Poll.

With the resident ratepayers better informed, the Board can place more reliance on the outcome of the Poll in reaching its decision.

Under Section 28 of the Municipal Board Act the Board, dismisses the current application to have the Board declare the

Village Service Act apply to the village of Conquerall Bank. An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 31st day of July, A.D., 1990.

MICHAEL G. JOHNSON,
Chairman.

LINDA D. GARBER,
Vice-Chairman.

RICHARD L. WELDON,
Member.

SCHEDULE "A"

INFORMATION CONCERNING VILLAGES IN NOVA SCOTIA

Nova Scotia has three types of municipal units: Cities, Towns and Rural Municipalities. There are no unorganized areas. A village is not a municipal unit. Under the Village Services Act, the residents of a small area of a rural municipality may apply to the Municipal Board for the incorporation of a village commission. The purpose of incorporating as a village is to be able to provide the area with one (or more) local services which is not provided by the rural municipality. Such services would include street lighting, sidewalks, sewer and water services. An area would apply to incorporate as a village rather than a town if it did not require all of the services which a town usually requires. A village does not have the powers or responsibilities of a town either.

A village remains part of the rural municipality. The residents continue to vote in the municipal elections, and to pay taxes to the rural municipality.

The members of the first village commission are appointed by the Municipal Board. Subsequent commissioners are elected at annual meetings of the electors. Supply of some services, for example sewer, water, garbage collection, must also be approved by vote of the electors before those services are provided. The village commission is empowered to levy and collect rates within the village to pay for the services, or it may request the rural municipality to collect the village rates along with its municipal taxes.

SCHEDULE "B"

RESPONSIBILITIES OF A VILLAGE COMMISSION

1. To hold an annual meeting of the electors of the village
2. To prepare an annual report
3. To have financial statements prepared and audited annually
4. To appoint a clerk and treasurer and any other staff required
5. To call special meetings of electors as required
6. To prepare operating and capital budgets each year
7. To set village rates
8. To provide those services authorized by the electors
9. To appoint an auditor

SERVICES THAT MAY BE PROVIDED BY A VILLAGE COMMISSION

1. Street lighting
2. Fire protection
3. Sewers, drains and ditches
4. Water
5. Electric light and power
6. Roads and sidewalks
7. Police constables
8. Acquire land and buildings to be used for public purposes and care for public grounds and buildings, squares and parks
9. Recreational programs
10. Garbage collection disposal
11. Agreements regarding sidewalks and highways (agreements are usually made with the municipality)

BY-LAWS CAN BE MADE WITH RESPECT TO THE FOLLOWING

1. Regulating Village proceedings
2. Regulating expropriation of property by the Village
3. Managing public property
4. Regulating elector or ratepayer meetings
5. Regulating the cleanliness of streets, sidewalks, roads and alleys
6. Regulating lock-up houses
7. Protecting Village property
8. Removal of snow and ice from roofs
9. Regulating building inspection and appointing a building inspector
10. Regulations to prevent accidents within buildings
11. Regulating or protecting drains, sewers or water courses
12. Regulating charges for curb, gutter and sidewalk frontages (with the approval of the municipal council)
13. Regulating the enforcement of payment of charges relating to the costs of streets, curbs, sidewalks, gutters, bridges, culverts and retaining walls
14. Licensing plumbers and pipefitters if the commissioners operate a water or sewer system and regulated related work.

SCHEDULE "C"

VILLAGE SERVICE ACT - HIGHLIGHTS

In this Act,

(a) "Board" means the Nova Scotia Municipal Board;

...

(e) "elector" means a person resident within the village entitled to vote at a municipal election;

...

(g) "ratepayer" means any person resident within the village entitled to vote at a municipal election who is also rated for occupancy tax or in respect of real or personal property within the village.

3 This Act shall not be declared to apply to any village the population of which does not exceed one hundred persons.

4(1) When the inhabitants of any village in the Province desire to avail themselves of any of the powers set forth in this Act, they shall present a requisition signed by at least twenty-five ratepayers of the village to the sheriff for the county of which the village forms part, requesting him to hold a poll of ratepayers of the village to determine whether or not a majority of the inhabitants thereof are in favour of this Act being declared to apply to the village.

(2) The requisition shall specify the population, area and boundaries of the proposed village and may be in Form A in the Schedule to this Act.

...

(4) A copy of the requisition prepared pursuant to subsection (1) shall be provided to the clerk of the Board, and to the clerk of the municipality of which the village forms a part.

(5) The requisition shall contain the name and mailing address of a person to whom notices and communication may be given with respect to the incorporation of the village.

5(1) Upon receipt of the requisition, the sheriff shall fix a day for taking the poll, which shall be not less than ten days or more than twenty-one days after the date of posting the notices required by this Section.

(2) Within twenty days from the receipt of the requisition, the sheriff shall cause notices of the time and place of taking of the poll to be posted in prominent places in the village.

6(1) The clerk of the municipality within which the village is situate shall upon application furnish the sheriff with the list of voters alphabetically arranged for the revisal section or sections of which the village forms a part.

(2) Only such of the voters named in such lists as are assessed on real or personal property within the boundaries of the village as given in the requisition shall be entitled to vote, and the sheriff shall prepare a list thereof.

(3) Such list shall be the list of voters used in taking the poll and every person whose name appears thereon shall be entitled to vote on the taking of such poll.

7(1) The sheriff or some person duly authorized by him shall preside at the taking of the poll and shall appoint a poll clerk whose duty it shall be to write down the name of each elector presenting himself to vote.

(2) The sheriff shall likewise appoint two ratepayers as scrutineers, who shall be present in the polling booth with the sheriff, or such person so authorized by him, and the clerk during the polling.

8 Upon the day and at the place fixed by the sheriff the poll shall be opened at eight o'clock in the forenoon and shall remain open until six o'clock in the afternoon.

9(1) The voting under the foregoing provisions of this Act shall be by ballot.

(2) The ballot may be in Form B in the Schedule to this Act.

...

13(1)The sheriff shall, within forty-eight hours of the closing of the poll, forward to the Board a return showing

a) the date of the poll;

b) the number of votes polled;

c) the number of ballots marked "For"'

d) the number of ballots marked "Against",

together with a certificate as to the number of persons resident in such village, the boundaries and the area of the village.

(2) The sheriff shall, if so required by the Board, prepare or have prepared a proper description of the boundaries of the village with a plan thereof, and shall forward a certified copy of such description and plan of the same to the Board.

14(1)If a majority of the votes polled are in favour of this Act applying to the village, then the Board shall hold a hearing with respect to the requisition.

(2) Notice of the date, time and location of the hearing shall be provided to the person named in subsection (5) of Section 4, the clerk of the municipality of which the village forms a part and the Minister.

(3) At the hearing, the Board shall her any interested person or municipality.

15(1)If it appears to the Board to be in the best interests of the inhabitants of the area it shall order that the Act apply to the village.

(2) The order made pursuant to subsection (1) shall

a) declare that on and after a date to be named in the order this Act shall apply to the village;

b) define the boundaries of the village to which this Act is to apply;

c) appoint three commissioners for the village for the carrying out of the purposes of this Act.

...

18 The commissioners appointed or elected under this Act and their successors in office shall be a body corporate under the name and title of "The Village Commissioners of...".

...

23 All meetings of the commissioners shall be open to the electors of the village.

...

30 A public meeting of the electors of the village, in this Act called the "annual meeting", shall be held on the first Tuesday of February in each year.

31 ...notice of the time and place of the annual meeting...posted up in not less than five conspicuous places in the village...at least ten days before the date of the meeting.

...

39 The commissioners may when necessary for carrying out the provisions of this Act convene a special meeting of the electors...give ten days notice thereof by posting up notices in conspicuous places in the village... .

40 The commissioners shall appoint a ... clerk and treasurer who shall be paid such salary as the commissioners may grant and shall provide a bond satisfactory to the commissioners for the faithful performance of his duties.

...

42 The commissioners may, subject to this Act, appoint all such officers and servants as may be necessary for the carrying out of the provisions of this Act.

43(1)The commissioners are hereby empowered to do all things which may be necessary or incidental to the effectual carrying out of the provisions of this Act, and to do all or any of the following:

a) ...provide street lights...;

b) ...provide...system of fire protection...;

c) construct...sewers...;

d) construct...water system...;

e) construct...a system for...power...;

f) ...construct...streets, roads and sidewalks;

g) appoint...police constables...and to establish lock-up houses...;

h) acquire...lands and buildings...for public purposes...;

i) operate recreational programs...;

j) provide...moving garbage...operate dumps...;

k) make...agreements relating to sidewalks and improvements on highways...[like] a municipality.

(2) The commissioners shall not provide any of the services authorized by this Section unless the electors of the village have authorized them...by resolution passed at a meeting of electors... .

(3) With the consent of the Minister, commissioners may extend...[the works] outside the limits of the village...

(4) The commissioners may charge...rates or fees for...water or electricity or for the use of drains or sewers... .

...

47(1)...the commissioners [may expropriate]...

48 The commissioners...shall have power to make by-laws

(l) ...fixing...charges rates of fees...for sewer frontages...;

(m) with the...approval of the...municipality...enforcing payment of such charges...for curb, gutter and sidewalk frontages;

(p) providing...

(iii) ...the charges become a lien on...property .

...

54(1)The commissioners shall have...power...to borrow...

(2) ...approved by a meeting of ratepayers of the village and by the Minister...

...

57(1)The commissioners shall...annually...rate...taxes...

58 The commissioners shall have with respect to the

rates and taxes of the village the same powers as are given to...the municipality... .

...

60 When [asked for in]...a petition of the majority of ratepayers residing in any area of the village...the commissioners may...rate...in the area... .

SCHEDULE

FORM A

1. That the petitioners are desirous that the Village Service Act be declared to apply to the village or district of... .

2. That the said area contains...acres... .

3. That there are not less than...residents and ratepayers resident within such area.

...hold a poll...to determine whether or not said Act shall be declared to apply to the village or district of... .

FORM B [ballot form]

Are you in favour of the provisions of the Village Service Act being made applicable to the Village of...?

FORM C

I...am...qualified as a commissioner for the village or district of... ."